TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~364.~~ 84 — 8.

14 Wall. 496.

DAVID DOWS, JOHN DOWS MAIRS, AND ALEXANDER ECTOR ORR, PLAINTIFFS IN ERROR,

vs.

THE NATIONAL EXCHANGE BANK OF MILWAUKEE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED DECEMBER 11, 1872.

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No. 364.

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a UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you or some of you, between the National Exchange Bank, of Milwaukee, plaintiff, and David Dows, John Dows Mairs, and Alexander Ector Orr, defendants, a manifest error hath happened, to the great damage of the said David Dows, John Dows Mairs, and Alexander Ector Orr, as is said and as appears by their complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the third Monday of December next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the law and custom of the United States, ought to be done.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 29th day of November, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States the ninety-seventh.

KENNETH G. WHITE,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

b UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Kenneth G. White, clerk of the circuit court of the United States of America for the southern dis't of New York in the second circuit, by virtue of the within writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from one to 182, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of David Dows and others, plaintiffs in error, against the National Exchange Bank of Milwaukee, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern dis't of New York in the second circuit, this seventh day of December, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States the ninety-seventh.

[SEAL.] KENNETH G. WHITE, *Clerk.*

(Indorsed:) Supreme Court of the United States. David Dows, John Dows Mairs, & Alexander Ector Orr, plaintiffs in error, vs. The National Exchange Bank of Milwaukee, defendants in error. Writ of er-

ror returnable 3d Monday of December, 1872. C. Van Santvoord, attorney for plaintiffs in error.

Allowed Nov. 29th, 1872.

L. B. WOODRUFF,
Circuit Judge.

Filed Nov. 29, 1872.

1 In the circuit court of the United States for the southern district of New York.

Pleas before the judges of the circuit court of the United States for the southern district of New York, at the city of New York, at the stated term of said court, held at said city on the third Monday of October, 1869.

Witness the honorable Lewis B. Woodruff, one of the judges of said court.

Clerk.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered that heretofore, to wit, at a stated term of the circuit court of the United States for the southern district of New York, held at the city of New York, in said district, before the judges of the said court, the National Exchange Bank of Milwaukee brought suit against David Dows, John Dows Mairs, and Alexander Ector Orr, in this court in the southern district of New York, and thereupon the said National Exchange Bank of Milwaukee, plaintiff, declared against
2 the said David Dows, John Dows Mairs, and Alexander Ector Orr, defendants, as follows, to wit:

3 Circuit court of the United States, southern district of New York.

THE NATIONAL EXCHANGE BANK OF MILWAUKEE, pl'ff, *ag'st* DAVID DOWS, JOHN DOWS MAIRS, AND ALEXANDER ECTOR ORR, def'ts. } Nov. 20, 1869.

The National Exchange Bank of Milwaukee, by Porter, Lowrey & Soren, its attorneys, complains of David Dows, John Dows Mairs, and Alexander Ector Orr, now in the custody of the marshal, &c., of a plea of trespass in the case, for that whereas the said The National Exchange Bank of Milwaukee at all the times hereinafter alleged was, and is now, a body corporate under that name, formed and organized as a national banking association under the laws of the Congress of the United States, and a citizen of the State of Wisconsin, and having its principal and usual place of business at the city of Milwaukee, in said State of Wisconsin, and the said David Dows, John Dows Mairs, and Alexander Ector Orr, at the same times aforesaid, were, and are now, severally citizens of the State of New York, and copartners doing
4 business therein under the firm-name of David Dows & Company, the said plaintiffs heretofore, to wit, on the 1st day of October, 1869, at the city of New York, in the State of New York, to wit, was the owner and was lawfully possessed as of its own property of certain wheat, to wit, of the following parcels thereof, namely, of three thousand

and forty-seven (3,047) bushels, which were laden on the canal-boat Four Sisters; of seven thousand and one hundred (7,100) bushels, which were laden on the canal-boat Hagerman; of four thousand three hundred and fifty-eight (4,358) bushels, which were laden on the canal-boat Anna Rebecca; and of seven thousand eight hundred and thirty-six (7,836) bushels, which were laden on the canal-boat George Ames; being all together twenty-two thousand three hundred and forty-one (22,341) bushels of wheat, or thereabouts, of great value, to wit, of the value of fifty thousand dollars ($50,000) lawful money of the United States, and, being so possessed, afterwards, to wit, on the day and year aforesaid, at said city of New York, to wit, the said plaintiff casually lost said several parcels of wheat out of its possession, and the same afterwards, to wit, on the day and year aforesaid at said city of New York, to wit, came to the possession of said defendants by finding; yet the said defendants, well knowing the said several parcels of wheat, and the whole thereof, to wit, the said twenty-two thousand three hundred and forty-one (22,341) bushels, to be the property of plaintiff, and of right to belong and appertain to it, but continuing and fraudulently intending craftily and subtley to deceive and defraud the plaintiff in this behalf, hath not as yet delivered the said wheat, or any part thereof, to the said plaintiff, though often requested so to do, and afterwards, to wit, on the day and year aforesaid, at said city of New York, the said defendant' converted and disposed of the said several parcels and of the whole of said wheat to their own use, to the damage of the plaintiff the sum of sixty thousand dollars, and therefore it brings this suit.

PORTER, LAUREY & SOREN,
Plaintiffs' Att'ys, 78 Broadway, N. Y.

(Indorsed:) U. S. circuit court, southern district of N. Y. The National Exchange Bank of Milwaukee v. David Dows, John Dows Mairs, and Alexander Ector Orr. Declaration. Porter, Laurey & Soren, plff's' att'ys, 78 Broadway, N. Y. City.

Circuit court of the United States for the southern district of New York, in the second circuit.

DAVID DOWS, JOHN DOWS MAIRS, AND ALEXander Ector Orr, *ads.* / THE NATIONAL EXCHANGE BANK OF MILwaukee. } Nov. 20, 1869.

And the said defendant', David Dows, John Dows Mairs, and Alexander Ector Orr, by C. Van Santvoord, their attorney, comes and defend' the wrong and injury, when, &c., and say that they are not guilty of the said supposed premises above laid to their charge, or any or either of them, or any part thereof, in manner and form as the said plaintiff has above thereof complained against them. And of this they, the said defendants, put themselves upon the country.

C. VAN SANTVOORD,
Def'ts' Attorney.

(Indorsed:) Circuit court of the United States for the southern district of New York, in the second circuit. David Dows, John Dows Mairs, and Alexander Ector Orr, ads. The National Exchange Bank of Milwaukee. Copy plea filed with the clerk. C. Van Santvoord,

def'ts' att'y, 6 Hanover s't, New York. To Porter, Lowrey & Soren, pl'ff's att'ys.

9 And thereupon the process thereof is continued between the parties aforesaid of the plea aforesaid in this same court, before the judges thereof, and the issue above joined is ordered by the said court to be tried at the term of this court, appointed to be held at the city of New York on the first Monday of April, in the year 1872, at which day and place last aforesaid came the parties aforesaid, by their attorneys aforesaid, before the judges of the said court; and the jurors of the jury summoned to try the said issue being called, also came, who, to speak the truth of the matter aforesaid, being chosen, tried, and sworn, say, upon their oath, that the said defendants are guilty of the premises above laid to their charge in manner and form as the said plaintiff hath above complained against them, and they assess the damages of said plaintiff by reason of the premises over and above his costs and charges by him about his suit in this behalf expended to thirty-one thousand one hundred and eleven $\frac{51}{100}$ dollars. Therefore, it is considered that the said plaintiff do recover against the said defendants
10 his said damages by the jurors aforesaid, in the form aforesaid assessed, and also fifteen hundred and sixty-nine dollars ($1,569.00) for his costs and charges by the court here adjudged of increase to the said plaintiff, with his assent, which said damages, costs, and charges, in the whole, amount to thirty-two thousand six hundred and eighty dollars and fifty-one cents, ($32,680.51.)

Judgment signed this 22d day of November, 1872.

R. E. STILWELL,
Deputy Clerk.

(Indorsed:) Circuit court of the United States in and for the southern district of Wisconsin. The Wisconsin Marine and Fire Insurance Company vs. David Dows, John Dows, Mairs & Alexander Ector Orr. Judgment-roll filed Nov'r 23, 1872.

11 U. S. circuit court for the southern district of New York.

THE NATIONAL EXCHANGE BANK OF MILWAUKEE
against
DAVID DOWS, JOHN DOWS MAIRS, AND ALEXANDER ECTOR ORR.

BILL OF EXCEPTIONS.

And afterwards, to wit, at a term of the circuit court of the United States held at the city of New York, in & for the southern district of New York, in the second circuit, the issues so as above joined between the parties came on to be tried before the honorable Lewis B. Woodruff, circuit judge, and a jury for that purpose duly impaneled, good and lawful men of said district, on the 15th day of April, 1872.

The plaintiff's counsel, to maintain the issue on their part, put in evidence first the deposition of Peter Scherer, of the city of Milwaukee and State of Wisconsin, taken in this cause at Milwaukee on the 18th day of February, A. D. 1870, on due notice to the attorney of the defendants, before Joseph Colt as United States commissioner, as follows:

PETER SCHERER, being duly sworn, doth depose and say:

I live in Milwaukee, Wisconsin. In the month of September, 1869, I was foreman of Angus Smith & Co.'s elevator B, a warehouse situated in Milwaukee. On September 1, 1869, 4,322 35/60 bushels of No. 2 wheat and 2,476 40/60 bushels of No. 1 wheat were loaded from said elevator on board the schooner Kate Kelly. I superintended the loading, to the best of my knowledge; there was no other vessel of that name loaded from said elevator during the month of September, 1869.

On the 25th of September, 1869, 6,364 bushels No. 1 wheat were loaded from said elevator, on board the schooner Corsican. I superintended the loading, to the best of my knowledge; no other vessel of that name was loaded from said elevator during the month of September, 1869, to my knowledge, or as appears from the elevator's books.

On the 11th of September, 1869, 5,297 50/60 bushels number one wheat were loaded from said elevator, on board the schooner Granada. I superintended the loading, to the best of my knowledge; no other vessel of that name was loaded from said elevator during the month of September, 1869, so far as I know or as appears from the elevator's books. I remember superintending the loading of these vessels from the elevator.

PETER SCHERER.

12 The plaintiff's counsel next put in evidence the deposition of Thomas E. Jones, of the city of Milwaukee and State of Wisconsin, taken in this cause at Milwaukee, on the 17th day of February, A. D. 1870, on due notice to the attorney of the defendants, before said United States commissioner, as follows:

THOMAS E. JONES, being first duly sworn, deposes and says:

I reside in Milwaukee, Wisconsin. I am foreman in elevator A in said city; was such foreman in September last. That elevator is a large warehouse in the city of Milwaukee. My duties as such foreman were to see to the shipping of grain, and general supervision of the elevator. I was at the elevator in the month of September last. There was wheat loaded from that elevator, on board the schooner Corsican, on or about 25th of September last. Seven thousand and thirty-six (7,036) bushels were loaded on the schooner Corsican from elevator A. I was present, and saw the said wheat loaded on the said vessel. There was wheat loaded from that elevator, on board the schooner Kate Kelly, on or about 1st September, 1869. There were (9,455.05) ninety-four hundred and fifty-five 05-60 bushels loaded from that elevator on board the schooner Kate Kelly. I saw it put aboard that vessel. On or about the 11th of September, 1869, there were (9,202.10) ninety-two hundred and two 10-60 bushels loaded from that elevator on board the schooner Grenada. I saw it put aboard said vessel. I find by my books that no other wheat than the amount above mentioned was shipped on the above dates in the aforesaid-mentioned vessels, or any of them, from said elevator A. Angus Smith & Co., of this city, are the proprietors of elevator A. I am 34 years of age.

THO'S E. JONES.

A stipulation was here put in evidence between H. M. Finch, esq., acting for and on behalf of the plaintiff, and Wirt Dexter, esq., acting for and on behalf of the defendants, in the suit of the Wisconsin Marine and Fire Insurance Company versus David Dows, John Dows Mairs, and Alexander E. Orr, in reference to the taking the testimony of witnesses at Milwaukee before the commissioner, as follows:

Stipulation.

In order that the witnesses may give their evidence in a connected manner, without being interrupted by objections, and without having the testimony interspersed with objections, it is mutually stipulated and agreed that no objection of any kind, except to the form or language of an interrogatory, need be taken by us or either of us, or noted by the commissioner at the time of the taking of said testimony; but either party may object at the trial to any portion of the said testimony, or the exhibits, with the same force or effect as if objections had been made and noted at the time the said testimony was taken.

This stipulation shall apply to and be binding in the several cases pending in the above court in favor of the plaintiff against John Wilmot, and of the Milwaukee National Bank of Wisconsin against John Wilmot, and of the same bank against Hughes, Hickox & Co.; also in the case of the National Exchange Bank of Milwaukee against David Dows & Co., and the same bank against John Wilmot, in which testimony may be taken by said Colt, by us as attorneys, or acting in behalf of said named parties.

Dated February 17, 1870.

WIRT DEXTER,
H. M. FINCH.

The plaintiff's counsel next read in evidence from the deposition of William G. Fitch, of the city of Milwaukee and State of Wisconsin, taken in this cause at Milwaukee on the 24th and 26th days of February, A. D. 1870, on due notice to the attorney of defendants before said United States commissioner, as follows:

13 WILLIAM G. FITCH, being duly sworn, says:

My name is William G. Fitch. I reside in Milwaukee, Wisconsin; am 35 years old; am cashier of the plaintiff, the National Exchange Bank of Milwaukee; said bank is located in the city of Milwaukee, State of Wisconsin; was such cashier in the month of September, 1869. I know the firm of W. P. McLaren & Co., of Milwaukee.

Q. Did the firm of W. P. McLaren & Co., in the month of September, 1869, present to the plaintiff for discount, on or about the 13th of September, any draft or drafts drawn by said firm on A. F. Smith & Co., Oswego, N. Y.? If yea, state the number of drafts, the amount and when drawn, and if you have the originals produce them to the commissioner, that the same or a copy thereof may be attached to your deposition.

A. On or about the 13th September, 1869, W. P. McLaren & Co. left with me for discount and credit to their account one draft on A. F. Smith & Co., at sight, for $1,232.24, and draft at 30 days after date for $8,000, and one draft at 45 days after date for $8,000. I have here the original time-drafts, and produce them to the commissioner.

The plaintiff's counsel here read in evidence the original time-drafts marked Exhibits No. 1 and 2 F. B., of which copies made by the commissioner and attached to the deposition were marked Exhibits Nos. 1 and 2, as follows:

Exhibit No. 1, (W. G. Fitch.) Jos. Colt, special commissioner.

$8,000. MILWAUKEE, *Sept.* 13, 1869.

Thirty days after date, pay to the order of W. G. Fitch, cash'r, eight

thousand dollars, with N. Y. exchange, at Merchants' B'k, Watertown, N. Y., value received, and charge the same to account of

W'M P. McLAREN & CO.

To Messrs. A. F. SMITH & Co.,
Oswego, N. Y.

(Written across face:) A. F. SMITH & Co.

(Endorsed.)

Pay Merchants' Bank, Watertown, N. Y., or order, for collection, account of Nat'l Exchange Bank, Milwaukee. W. G. Fitch, Cas.

[$4 int. rev. stamps cancelled.]

Protested Oct. 16, 1869.

Annexed to this draft was a certificate by J. F. Moffitt, notary public, of presentation of the draft at the Merchants' Bank, and demand of payment Oct. 16, 1869, and of protest for non-payment, and of service of due notice of demand and protest.

Notice for A. F. Smith & Co., directed to Oswego, N. Y.
" W. P. McLaren & Co., " Milwaukee, Wis.
" W. G. Fitch, cash., " " "

Exhibit No. 2, (W. G. Fitch.) Jos. Colt, special commissioner.

$8,000. MILWAUKEE, *Sept.* 13, 1869.

Forty-five days after date, pay to the order of W. G. Fitch, cash'r, eight thousand dollars, with N. Y. exch,. at the Merchants' B'k,
14 Watertown, N. Y., value received, and charge the same to account of

W'M P. McLAREN & CO.

To Messrs. A. F. SMITH & Co.,
Oswego, N. Y.

(Written across face:) A. F. SMITH & Co.

Prot. Oct. 30, '69.

J. F. M., *N. P.*

(Endorsed.)

[$4 int. rev. stamps, duly cancelled.]

Pay Merchants' Bank, Watertown, N. Y., or order, for collection, account of Nat. Exchange Bank of Milwaukee.

W. G. FITCH, *Cas.*

Certificate of protest annexed on the 30th day of October, 1869, and of due notice of the demand and protest for
A. F. Smith & Co., directed to Oswego, N. Y.
W. P. McLaren & Co., " Milwaukee, Wis.
W. G. Fitch, cash., " " "

The sight-draft was paid.

Q. Did the firm of W. P. McLaren & Co., at the time of the delivery of the said drafts, also deliver to the plaintiff a bill of lading of a cargo of grain; if yea, have you the original bill of lading, and will you produce the same to the commissioner, that the same or a copy thereof may be attached to your deposition?

A. I have before me the original bill of lading of the schooner Grenada, for 14,500 bushels number one (1) amber Milwaukee wheat, to which the drafts mentioned above were attached.

The counsel for the plaintiff here read in evidence the bill of lading, dated Milwaukee, September 11, 1869, marked by the commissioner Exhibit No. 3, F. B., of which a copy made by the commissioner was attached to the deposition marked Exhibit No. 3, as follows:

Exhibit No. 3, (W. G. Fitch.)

MILWAUKEE, *Sept.* 11, 1869.

Shipped in good order and condition, by William P. McLaren & Co., as agents and forwarders, for account and at the risk of whom it may concern, on board the schooner Grenada, whereof A. D. McIntyre is master, bound from this port for Oswego, the following articles, as are marked and described, to be delivered in like good order and condition, as addressed on the margin, or to his or their assigns or consignees, upon paying the freight and charges as noted below, (dangers of navigation, fire, and collision excepted.)

And it is agreed between the carriers and shippers and assigns, that in consideration especially of the rate of freight hereon named, the said carriers having supervised the weighing of said cargo *in* board, hereby agree that this bill of lading shall be conclusive as between shippers and assigns and carriers, as to the quantity of cargo to be delivered to consignees at the port of destination, (except when grain is heated or heats in transit,) and that they will deliver the full quantity hereon named, or pay for any part of cargo not delivered at the current market price; the value thereof to be deducted from the freight-money by consignees, if they shall so elect, and thereupon the carrier shall be subrogated to the shippers and owners' rights of property and action therefor.

And said shippers or owners hereby assign their claim and right of action for such deficiency or deficiencies to the carrier.

15 In witness whereof the said master of said vessel hath affirmed to 3 bills of lading, of this tenor and date, one of which being accomplished the other' to stand void.

Ac. W. G. Fitch, cash.
Care Merchants' Bank,
Watertown, N. Y.

Fourteen thousand five hundred (14,500) bushels No. 1 amber Milwaukee wheat.

Freight payable by consignees at the rate of twelve (12) cents per bushel of 60 lbs.

A. D. McINTYRE, *Master.*

Q. Is there an endorsement on the back of that bill of lading?

A. There is, in my handwriting; the signature to the endorsement on the bill of lading is mine. The endorsement was made on the day of its date, Sept. 13, 1869.

The plaintiff's counsel propose to read the endorsement; defendants' counsel objected; question reserved, and same was read subject to objection, as follows:

Endorsement.

On payment of two drafts drawn by W. P. McLaren & Co., on A. F. Smith & Co., Oswego, N. Y., to my order, and dated Sept. 13, 1869—one draft at 30 days' date for $8,000, and the other at 45 days' date for $8,000, both drafts being payable at the Merchants' Bank, Watertown,

N. Y.—you will surrender the within-mentioned wheat to A. F. Smith & Co., or order. Should drafts above mentioned not be promptly paid, hold the wheat for my account.

Without recourse.

W. G. FITCH, *Cash.*

MERCHANTS' BANK, *Watertown, N. Y.*

MILWAUKEE, 13 *Sept.*, 1869.

Q. Did the firm of W. P. McLaren & Co. also deliver to the plaintiff, in connection with said draft and bill of lading, certificates of insurance on the cargo?

A. They did. The cargo was insured for $23,500. The certificates, were endorsed W. P. McLaren & Co.; one for $16,500, No. 2,729, dated September 11th, 1869, issued by the Ætna Ins. Co., of Hartford, the other for $7,200, No. 327, dated Sept. 11, 1869, issued by the Home Ins. Co., of New Haven.

These certificates of insurance in the name of W. P. McLaren & Co., under and subject to the condition of cargo policy referred to, and endorsed by W. P. McLaren & Co., in blank, and expressed to be "on the cargo of the schooner, (naming it,) at and from Milwaukee to Oswego," loss, if any, payable to their order thereon and return of this certificate, was here read in evidence.

Q. State whether or not the plaintiff discounted and placed to the credit of W. P. McLaren & Co. said drafts?

A. They did.

Q. What did the plaintiff do with said drafts and bill of lading after receiving the same and discounting them for W. P. McLaren & Co.?

A. I, as cashier of the National Exchange Bank of Milwaukee, enclosed the drafts and bill of lading and certificates of insurance by mail on the 13th of Sept., 1869, to the Merchants' Bank, of Watertown, New York, for collection and remittance to Mercantile National Bank, New York, for the credit of the plaintiff, accompanied with my letter dated Sept. 13th, 1869, to the Merchants' Bank, of Watertown, N. Y., a letter-press copy of the written portion of which is hereto attached, marked Exhibit No. 4.

16 The plaintiff's counsel here offered to read said letter-press copy, marked Exhibit No. 4.

Defendants' counsel objected to that letter on the same grounnd as to the endorsement on the bill of lading, as private instructions from the bank which could not affect the title of a party to whom it might be shipped for value, or under contract of sale. Decision reserved; copy read subject to the objection, as follows:

Exhibit No. 4, (*W. G. Fitch.*)—*Jos. Colt, Special Commissioner.*

SEPT. 13, '69.

MERCHANTS' BANK, *Watertown, N. Y.:*

I hand you for collection and remittance to Mercantile Nat. Bank, New York, for my credit:

W. P. McLaren & Co., on A. F. Smith & Co., Oswego	Oct. 16,	$8,000	ex.
W. P. McLaren & Co., on A. F. Smith & Co., Oswego	Oct. 31,	8,000	ex.
W. P. McLaren & Co., on A. F. Smith & Co., Oswego		1,232 24	ex.

B. L. sch. Grenada, 14,500 bush. wheat, consigned to your bank, for my ac. and to be held by you subject to the payment of drafts drawn against it as per endorsement of B. L.

Insured Ætna Ins. Co., $16,000.

In case of non-acceptance or non-payment, please advise me by telegraph.

V'y truly,

W. G. FITCH, *C.*

Q. Did you receive any letter or letters from the bank acknowledging the receipt of your letter and its enclosures, drafts, bill of lading and insurance certificate?

A. I did.

Q. Are the two letters shown you the two letters you received from the Merchants' Bank?

A. They are.

The plaintiff's counsel here read the two letters of which copies are attached to the deposition, and marked Exhibits Nos. 5 and 6, as follows:

Exhibit No. 5, (W. G. Fitch.)—Jos. Colt, Special Commissioner.

MERCHANTS' BANK,
Watertown, N. Y., Sept. 16, 1869.

W. G. FITCH, Esq., *Cash.:*

DEAR SIR: I have received your letter of the 13th inst. with enclosures as stated, and it has attention.

Respectfully, yours,

J. F. MOFFITT, *Cashier.*

Exhibit No. 6, (W. G. Fitch.)—Jos. Colt, Special Commissioner.

NORRIS WINSLOW, *Banker.* J. F. MOFFITT, *Cashier.*

MERCHANTS' BANK,
Watertown, N. Y., Sept., 20th, 1869.

W. G. FITCH, Esq., *Cashier:*

DEAR SIR: We this day remit to the Mercantile Nat'l B'k N. Y., for your cr.... $1,227 62

Coll. A. F. Smith & Co	$1,232 24	
Less coll. 3-8	4 62	
		$1,227 62

Yours,

J. F. MOFFITT, *Cas.*
GREENLEAF.

17 Q. Were the time-drafts paid?

A. They were returned by the Merchants' Bank, protested for non-payment. The certificates of protest are attached to the original drafts.

The plaintiff's counsel here read the certificates of protest which are above herein set forth.

Q. Did the firm of W. P. McLaren & Co., in the month of September, 1869, and when, present to the plaintiff any other drafts drawn by said firm on A. F. Smith & Co., Oswego, New York? If yea, state the date of each draft, the amount of each draft, and when payable; and if the

said firm at the time of presenting said drafts to the plaintiff also delivered to the plaintiff any other bills of lading of any cargoes of wheat. If yea, state the date of each bill of lading, the name of the vessel, the quantity of wheat named in each bill of lading, and if you have the original drafts and bill of lading, or either of them, produce the same to the commissioner.

A. The firm of W. P. McLaren & Co. presented to the plaintiff on the 2d September, 1869, for discount and credit, one draft on A. F. Smith & Co., at sight, for $4,080.81, and one draft, at thirty days after date, for $7,500, and one draft, at forty-five days after date, for $7,500; all drafts bearing date September 2, 1869. Accompanying these drafts, and attached to them, was the bill of lading of the schooner Kate Kelly, for 8,727 bushels amber Milwaukee wheat, and 5,527$\frac{20}{60}$ bushels No. one amber Milwaukee wheat, dated September 1, 1869, together with certificates of insurance, as follows: Cert. No. 3623, Nat'l Ins. Co., of Boston, Mass., for $5,000, dated Aug. 31, 1869; cert. No. 108, North Western National Ins. Co., of Milwaukee, for $5,000, dated Aug. 31, 1869; cert. No. 2,531, Security Ins. Co., of New York, for $4,000, dated August 31, 1869; cert. No. 2,724, Ætna Insurance Company, of Hartford, for $5,000, dated Aug. 31, 1869; cert. No. 1,122, Republic Ins. Co., of Chicago, for $5,000, dated Aug. 31, 1869. The drafts were discounted by the plaintiff, and proceeds credited to the account of W. P. McLaren & Co., and the drafts, with the bill of lading and certificates of insurance forwarded by the plaintiff, enclosed in a letter, dated September 2, 1869, to the Merchants' Bank, of Watertown, New York, for collection and remittance to the Mercantile National Bank of New York, for the plaintiff's credit.

The sight draft for $4,080.81, was paid and remitted for by the Merchants' Bank, of Watertown, as directed; the thirty-day draft was paid and remitted for by the Merchants' Bank, of Watertown, as directed; the forty-five day draft for $7,500 was not paid, but returned to the plaintiff protested for non-payment.

The plaintiff's counsel here read in evidence the original forty-five day draft, and with the endorsement thereon, of which a copy is attached to the deposition, marked Exhibit No. 7, the certificate of protest thereof, marked Exhibit No. 8, the bill of lading marked Exhibit No. 9. The endorsement on said bill of lading, dated 2d September, 1869, and the letter-press copy of the written part of the original letter, dated 2d September, 1869, to the Merchants' Bank, of Watertown, enclosing drafts, certificates of insurance, and bill of lading marked Exhibit No. 10, referred to in the foregoing answer, and of which the following are copies.

The said endorsement on said bill of lading and letter of September 2d read, subject to the same objection previously taken by defendants' counsel to the reading of like endorsement on the bill of lading of schooner Grenada, and letter of W. G. Fitch, cashier, of Sept. 13, '69, Exhibit No. 4.

18 *Exhibit No. 7, (W. G. Fitch.)—Jos. Colt, Special Commissioner.*

$7,500. MILWAUKEE, *Sept.* 2.

Forty-five days after date, pay to the order of W. G. Fitch, cash'r,'

seventy-five hundred dollars with N. Y. exch., payable at Merchants B'k, Watertown, value received, and charge the same to account of

W'M P. McLAREN & CO.

To Messrs. A. F. SMITH & Co., *Oswego, N. Y.*

(Written across face:) A. F. SMITH & Co.

(Endorsed:)

[$3.75 rev. stamps, cancelled.]

Pay Merchants' Bank, Watertown, N. Y., or order, for collection account of Nat'l Exchange Bank, Milwaukee.

W. G. FITCH, *Cas.*

Certificate of protest annexed Exhibit No. 8, (W. G. Fitch,) on the 20th day of October, 1869, and of due notice of the demand and protest.

For A. F. Smith & Co., directed to Oswego, N. Y.
" W. P. McLaren & Co., " " Milwaukee, Wis.
" W. G. Fitch, cash., " " " "

Exhibit No. 9, (*W. G. Fitch.*)—*Jos. Colt, Special Commissioner.*

(Original.)

No. MILWAUKEE, *September* 1, 1869.

Shipped in good order and condition by W'm P. McLaren & Co., as agents and forwarders, for account, and at the risk of whom it may concern, on board the schooner Kate Kelly, whereof is master, bound from this port for Oswego, the following articles, as here marked and described, to be delivered in like good order and condition, as addressed on the margin; or the his or their assigns or consignees, upon paying the freight and charges as noted below; (dangers of navigation, fire, and collision excepted.)

And it is agreed between the carriers and shippers, and assigns, that in consideration, especially, of the rate of freight hereon named, the said carriers, having supervised the weighing of said cargo inboard, hereby agree that this bill of lading shall be conclusive, as between shippers and assigns, and carriers, as to the quantity of cargo to be delivered to consignees, at point of destination, (except when grain is heated, or heats in transit,) and that they will deliver the full quantity hereon named, or pay for any part of cargo, not delivered, at the current market price; the value thereof to be deducted from the freight-money, by consignees, if they shall so elect, and thereupon the carriers shall be subrogated to the shippers' and owners' rights of property, and action thereof.

And the said shippers or owners hereby assign their claim and right of action, for such deficiency or deficiencies to the carrier.

In witness whereof, the said master of said vessel hath affirmed to three bills of lading, of this tenor and date, one of which being accomplished, the other to stand void.

19 Ac. W. G. Fitch, cashier, care Merchants' Bank, Watertown, N. Y.

Eighty-seven hundred and twenty-seven (8,727,) bushels amber Milwaukee wheat.

Fifty-five hundred and twenty-seven 20-60 (5,527-

20-60) bushels No. one amber Milwaukee wheat. Freight payable by consignees, at the rate of ten (10) cents per bushel of 60 pounds.

ROBERT HAYES,
Master.

(Endorsed:)

On payment of three drafts, drawn by W. P. McLaren & Co., on A. F. Smith & Co., Oswego, N. Y., to my order, and dated September 2, 1869—one draft at sight, for $4,080.81; one draft at thirty days' date, for $7,500; and one draft at forty-five days' date, for $7,500, all being payable at the Merchants' Bank, Watertown, N. Y.—you will surrender the within-mentioned wheat to A. F. Smith & Co., or order. Should the drafts above specified not be paid promptly, hold the wheat for my account.

W. G. FITCH, *Cashier.*

To MERCHANTS' BANK,
Watertown, N. Y.

MILWAUKEE, 2d September, 1869.

Exhibit No. 10, (*W. G. Fitch.*)—*Jos. Colt, Special Commissio*

SEP

To CASHIER MERCHANTS' BANK,
Watertown, N. Y.

I hand you for collection and remittance to Mercantile Nat. Bank, New York, for my credit:

W. P. McLaren & Co. on A. F. Smith & Co., Oswego,			$4,080 81 ex.
Do	do	Oct. 5,	7,500
Do	do	Oct. 20,	7,500

B. L. sch. Kate Kelly, 8,727 bush. amber Mil. wheat.
" " 5,527.20 " No. 1 amber Mil. wheat;
consigned to your bank for my ac., and to be held by you subject to the payment of the above drafts.

Insured Northwestern Nat. Ins. Co	$5,000
Nat. Ins. Co., Boston	5,000
Ætna Ins. Co., H'tf'd	5,000
Republic Ins. Co	5,000
Security Ins. Co	4,000

I consign this wheat to you, to be held as per endorsed B. L., and surrender only on payment of the drafts drawn against it, holding you responsible for the same in case of non-payment of the drafts. Will you receive consignment in this way, charging reasonably for same?

Yours truly,

W. G. FITCH, *Cas.*

The plaintiffs also read the certificates of insurance, all dated August 31st, 1869, certifying that W. P. McLaren & Co. were insured under and subject to conditions of policy referred to on wheat in board cargo schooner Kate Kelly, at and from Milwaukee to Oswego, loss, if any, payable to the assured or order thereon, on return of that certificate, and all endorsed in blank by W. P. McLaren & Co.

Q. Did you receive a reply to your letter enclosing the said drafts, bill of lading, and insurance certificates; if yea, is the paper shown you the letter?

A. I did receive a reply, and paper shown me is such reply. The following is a copy attached to the deposition marked Exhibit No. 11.

20 *Exhibit No.* 11, (*W. G. Fitch.*)—*Jos. Colt, Special Comm'r.*

MERCHANTS' BANK,
Watertown, N. Y., Sept. 6, 1869.

W. G. FITCH, Esq.

DEAR SIR: I have received your letter of the 2d inst, with enclosures as stated, and it has attention.

Respectfully, yours,

J. F. MOFFITT, *Cashier.*

Q. Did the firm of W. P. McLaren & Co. deliver to the plaintiff any other drafts and bill or bills of lading, in the month of Sept., 1869, than those already mentioned? If yea, please give a detailed statement of the same.

A. The firm of W. P. McLaren & Co. presented to the plaintiff, on the 27th Sept., 1869, for discount and credit, one draft on A. F. Smith & Co., of Oswego, N. Y., payable at sight, for $3,422.93; and one draft, at thirty days after date, for $6,600; and one draft, at forty-five days after date, for $6,600; all said drafts bearing date Sept. 27, 1869. Accompanying these drafts, and attached to them, was the original bill of lading of the schooner Corsican, for 13,400 bushels number one amber Milwaukee wheat. The bill of lading, bearing date Sept. 25, 1869, together with certificates of insurance, as follows: Certificate No. 2,587, the Security Ins. Co., of New York, for $4,880, dated Sept. 26, 1869; certificate No. 1,100, Western Ins. Co., of Buffalo, N. Y., for $4,880, dated Sept. 26, 1869; certificate No. 350, the Home Ins. Co., of New Haven, Conn., for $9,000, dated Sept. 25, 1869; the drafts above mentioned were discounted by the plaintiff, and the proceeds credited to the account of W. P. McLaren & Co., and the drafts, with the bill of lading and certificates of insurance, forwarded by the plaintiff, enclosed in a letter, dated Sept. 28, 1869, to the Merchants' Bank, Watertown, N. Y., for collection and remittance to the Mercantile National Bank, of New York, for the plaintiff's credit; the sight draft for $3,422.93 was paid and remitted for by the Merchants' Bank of Watertown, as directed; the thirty-day draft, for $6,600, was not paid, but was returned to the plaintiff protested for non-payment; the forty-five day draft, for $6,600, was not paid, but returned to the plaintiff, protested for non-payment.

The following are copies of the thirty-day draft with its endorsement, marked Exhibit No. 12, and the certificate of protest thereof, on the 30th Oct., 1869; of the forty-five day draft, with endorsement thereon, and certificate of protest, on the 13th November, 1869, marked Exhibit No. 13; the bill of lading, dated Sept. 25, 1869, schooner Corsican, marked Exhibit No. 14; the endorsement on the bill of lading, dated 27th Sept., 1869, marked Exhibit No. 15; and copy letter-press copy of letter of W. G. Fitch, cashier, referred to in the foregoing answer, dated Sept. 28th, 1869; all of which were read in evidence by the plaintiff's counsel, the said endorsement on said bill of lading and instruction in said letter to the Watertown Bank, Exhibit No. 16, as to holding, being read subject to the same objection as to like endorsement and instruction in letter enclosing documents of schooner Kate Kelly, to Watertown Bank.

Exhibit No. 12, (*W. G. Fitch.*)—*Jos. Colt, Special Commissioner.*

$6,600. MILWAUKEE, *Sept.* 27, 1869.

Thirty days after date, pay to the order of W. G. Fitch, cashier, 21 six thousand six hundred dollars, with N. Y. exchange, at Merchants' B'k, Watertown, N. Y., value received, and charge the same to account of

W. P. McLAREN & CO.

To Messrs. A. F. SMITH & Co.,
Oswego, N. Y.

(Written across face:) A. F. SMITH & Co.

(Endorsed:)

[$3.30-100 U.S. rev. stamps, cancelled.]

Pay Merchants' Bank, Watertown, N. Y., or order, for collection account of Nat. Exchange Bank, Milwaukee.

W. G. FITCH, *Cashier.*

The above was protested October 30, 1869, and certificate of protest on the 30th of October, 1869, by Moffitt, was annexed, of the same tenor with the other certificates of protest hereinabove set forth, except the date, with seal and revenue stamp duly cancelled the same.

Exhibit No. 13, (*W. G. Fitch.*)—*Jos. Colt, Special Commissioner.*

$6,600. MILWAUKEE, *Sept.* 27, 1869.

Forty-five days after date, pay to the order of W. G. Fitch, cash'r, six hundred dollars, with N. Y. exch., at Merchants' B'k, Watertown, N. Y., value received, and charge the same to account of

W'M P. McLAREN & CO.

To Messrs. A. F. SMITH & Co.,
Oswego, N. Y.

(Endorsed.)

(Written across face:) A. F. SMITH & Co.

[$3.30 U.S. rev. stamps, cancelled.]

Pay Merchants' Bank, Watertown, N. Y., or order, for collection account of Nat'l Exchange Bank, Milwaukee.

W. G. FITCH, *Cas.*

The above protested November 13th, 1869, and the certificate of protest on the 13th day of November, 1869, of the same tenor with the other certificates of protest by him hereinabove set forth, except the date, with seal and revenue stamp duly cancelled, the same was annexed.

Exhibit No. 14, (*W. G. Fitch.*)—*Jos. Colt, Special Commissioner.*

(Original.)

No. MILWAUKEE, *Sept.* 25*th*, 1869.

Shipped in good order and condition by W'm P. McLaren and Co., as agents and forwarders, for account and at the risk of whom it may

concern, on board the schooner Corsican, whereof W. A. McCarthy is master, bound from this port for Oswego, the following articles, as are marked and described, to be delivered in like good order and condition, as addressed on the margin, or to his or their assigns or consignees, upon paying the freight and charges as noted below, (dangers of navigation, fire, and collision excepted.)

And it is agreed between the carriers and shippers, and assigns, that in consideration especially of the rate of freight hereon named, the said carriers having supervised the weighing of said cargo inboard, hereby agree that this bill of lading shall be conclusive as between shippers and assigns, and carriers, as to the quantity of cargo to be delivered to consignees at the port of destination, (except when grain is heated or heats in transit,) and that they will deliver the full quantity hereon named, or pay for any part of cargo not delivered, at the current market price; the value thereof to be deducted from the freight-money by consignees, if they shall so elect, and thereupon the carrier shall be subrogated to the shippers' and owners' rights of property and action therefor.

22

And said shippers or owners hereby assign their claim and right of action for such deficiency or deficiencies to the carrier.

In witness whereof the said master of said vessel hath affirmed to 3 bills of lading, of this tenor and date, one of which being accomplished the other' to stand void.

Ac. W. G Fitch, cash'r, care Merchants' Bank, Watertown, N. Y.

Thirteen thousand four hundred (13,400) bushels No. one amber Milwaukee wheat.

Freight payable by consignees at the rate of twelve (12) cents per bushel of 60 pounds.

W. A. McCARTHY,
Master.

Exhibit No. 15, (*W. G. Fitch.*)—*Jos. Colt, Special Commissioner.*

(Endorsement on the bill of lading:)

On payment of two drafts, drawn by W. P. McLaren & Co., on A. F. Smith & Co., Oswego, N. Y., to my order, and dated Sept. 27, 1869—one draft at 30 days' date, for $6,600, and one draft at 45 days' date, for $6,600, both drafts being payable at the Merchants' Bank, Watertown, N. Y.—you will surrender the within-mentioned wheat to A. F. Smith & Co., or order. Should drafts above mentioned not be promptly paid, hold the wheat for my ac.

Without recourse.

W. G. FITCH, *Cas.*

TO MERCHANTS' BANK, *Watertown, N. Y.*

MILWAUKEE, 27 *Sept.*, 1869.

Exhibit No. 16, (*W. G. Fitch.*)—*Jos. Colt, Special Commissioner.*

SEPT. 28, '69.

CASHIER MERCHANTS' BANK,
Watertown, N. Y.:

I hand you for collection and remittance to Mercantile Nat. Bank, N. Y., for my credit:

W. P. McLaren & Co., on A. F. Smith & Co		$3,422 93	ex.
Do	do Oct. 30	6,600	ex.
Do	do Nov. 14	6,600	ex.

B. L. sch. Corsican, 13,400 bush. wheat, consigned to you for my ac., and to be held by you, subject to the payment of drafts as above.

Insured,	Security Ins. Co	$4,880
	Western Ins. Co	4,880
	Home Ins. Co	9,000

In case of non-payment, or non-acceptance, please advise me per telegraph.

Very truly,

W. G. FITCH, *C.*

The certificates of insurance last above referred to—that of the Security Insurance Company, dated September 26, 1869; that of the Western Insurance Company, dated September 26, 1869; that of the Home Insurance Co., of New Haven, dated 25th September, 1869—certified that W. P. McLaren & Co. were insured, under and subject to the condition of policy referred to therein, on wheat in bond cargo schooner Corsican, at and from Milwaukee to Oswego, loss, if any, payable to the assured or order thereon, and return of that certificate, and were endorsed in blank, W. P. McLaren & Co.

23 Q. Did the plaintiff receive a letter from the Merchants' Bank, acknowledging the receipt of your letter September 28, 1869?

A. I did; the original letter is here produced; the same was marked Exhibit No. 17, and the following is a copy:

Exhibit No. 17, (*W. G. Fitch.*)—*Jos. Colt, Special Commissioner.*

MERCHANTS' BANK,
Watertown, N. Y., Oct. 1, 1869.

W. G. FITCH, Esq., *Cas.:*

DEAR SIR: I have received your letter of the 28th ult., with enclosures as stated, and it has attention.

Respectfully, yours,

J. F. MOFFITT, *Cashier.*

Q. After you received the letter of the Merchants' Bank, dated September 6, 1869, and marked Exhibit No. 11, did you write another letter to that bank, dated September 8, 1869? If yea, is the paper now shown you a letter-press copy of the written portion of that letter?

A. I did write another letter, and the paper now shown me is the letter-press copy of the written part of the original letter. The following is a copy of said letter-press copy produced and read in evidence and marked Exhibit No. 18:

Exhibit No. 18, (*W. G. Fitch.*)—*Jos. Colt, Special Commissioner.*

SEPT. 8, '69.

TO MERCHANTS' BANK,
Of Watertown, N. Y.:

In my letter of the 2d inst. I requested you to state in your letter whether you would hold all wheat I consign to you strictly for my ac., holding your bank responsible for the safe-keeping of the property for this bank, and holding such property subject to my orders, in all cases where the drafts made against it are not paid. Your reply of the 6th

inst. does not answer my inquiry. Will you please write me by return mail, defining your position? We have adopted the invariable rule to in no instance consign property, only on condition that the consignee acknowledges himself responsible for it, until instructed to hand over to a third party.

V'y respectfully,

W. G. FITCH, *C.*

Q. Did you receive a reply to that letter from the Merchants' Bank?

A. I did, and now produce the original letter received by me.

The following is a copy of said original letter, marked Exhibit No. 19, and read in evidence by plaintiff's counsel:

Exhibit No. 19, (*W. G. Fitch.*)—*Jos. Colt, Special Commissioner.*

NORRIS WINSLOW, *Banker.* J. F. MOFFITT, *Cashier.*

MERCHANTS' BANK,
Watertown, N. Y., Sept. 13, 1869.

W. G. FITCH, Esq., *Cas.:*

D'R SIR: Yours of the 8th rec'd. I believe your inquiry was answered in mine of the 11th inst.

Yours, resp'y,

J. F. MOFFITT, *Cas.*

24 Q. Between the date of your letter of September 8, 1869, and that of the Merchants' Bank, dated September 13, 1869, did you receive a letter from the Merchants' Bank? If yea, what is the date of said letter, and will you produce to the commissioner the original?

A. I will, and the letter bears date September 11, 1869, and I here produce the original.

The following is a copy of said original letter, marked Exhibit No. 20, read in evidence by the plaintiff:

Exhibit No. 20, (*W. G. Fitch.*)—*Jos. Colt, Special Commissioner.*

NORRIS WINSLOW, *Banker.* J. F. MOFFITT, *Cashier.*

MERCHANTS' BANK.
Watertown, N. Y., Sept. 11, 1869.

W. G. FITCH, Esq., *Cas.:*

D'R SIR: In reply to yours of 2d inst., I would say that we will receive (until further notice) such consignments as you choose to send us, holding us responsible for the grain, in case of non-payments of drafts, and shall charge ⅜ p. c. comm's for so doing.

Very respectfully,

J. F. MOFFITT, *Cas.*

Q. When, where, and by whom were the endorsements made on the backs of the original bills of lading of the schooners Grenada, Corsican, and Kate Kelly?

A. The bill of lading of the schooner Corsican was endorsed by me

on the 27th September, 1869, at Milwaukee, Wisconsin; the bill of lading of the schooner Kate Kelly was endorsed by me on the 2d September, 1869, at Milwaukee, Wisconsin; the bill of lading of the schooner Grenada was endorsed by me on the 13th September, 1869, at Milwaukee, Wisconsin.

Q. What interest, if any, had you personally in the consignments?

A. I had no interest in any of these consignments personally; I was acting as the cashier of the plaintiff. The plaintiff made the advances.

The defendants' counsel admits the incorporation of the plaintiff's, as alleged in the declaration.

The defendants' counsel read the cross-examination and the recross, and plaintiff's counsel read the redirect as follows:

Cross-examination by defendants' counsel:

Q. What sum did plaintiff receive for discounting the drafts referred to in your direct examination?

A. My recollection is ten (10) per cent. interest, and three-quarters of one per cent. for collection.

Q. Did you pay any portion of the freight from Milwaukee to Oswego, on the cargoes referred to in your direct examination?

A. I did not, nor did I direct any one so to do; nor did the plaintiff.

Q. When did plaintiff first learn, if ever, that the three cargoes in question went to the Corn Exchange elevator at Oswego?

A. I cannot tell the date when, but it was at the time the demand for the wheat was made of the Merchants' Bank of Watertown.

Q. After the three cargoes in question left Milwaukee, did you give any directions as to what elevator they should go to at Oswego, or did you make any inquiry as to what elevator they had in fact gone to after they left the port of Milwaukee?

25 A. I gave no directions, nor made any inquiry.

Q. You left the selection of the elevator or warehouse where the three cargoes in question should go, upon their arrival in Oswego, entirely to the bank at Watertown, did you not?

A. I consigned the wheat to the Merchants' Bank at Watertown, to handle as directed on the bills of lading.

Q. Did you designate any elevator or warehouse at Oswego where the wheat should go upon arrival, or did you leave that question to the bank at Watertown, so far as the plaintiff was concerned?

A. I designated no warehouse, but left the question of the selection of the warehouse with the Merchants' Bank at Watertown.

Q. Did you personally conduct all the correspondence between plaintiff and the bank at Watertown, in regard to the grain in question?

A. I did.

Q. When W. P. McLaren & Co. brought to your bank for discount the drafts referred to in your direct examination, did they exhibit any authority from A. F. Smith & Co. to draw upon them?

A. No; they told me they had order to buy for Smith a cargo of wheat at some times; at other times they simply asked me if I could do such and such time-paper on Oswego.

Q. In your direct examination you say that you personally wrote the memorandum on the back of the respective bill of lading for the three cargoes in question; state where, particularly, this was done.

A. At my desk in the banking-office of plaintiff.

Q. How long have you known the firm of A. F. Smith & Co., and to

what extent, if any, has the plaintiff discounted drafts upon them previous to the transactions in question?

A. I have known of A. F. Smith for, I should think, five years, and of the firm of A. F. Smith & Co., I think, for about two years. The plaintiff has discounted time and sight drafts, both, on A. F. Smith & Co., previous to the transaction in question, to quite a considerable extent. The drafts were always promptly paid until these in question.

Q. Were such drafts predicated upon bills of lading?

A. They were, with occasional exceptions, for small amounts drawn for margins for grain held here; I have, in a few instances, taken drafts for one or two thousand dollars without bill of lading attached.

Q. When plaintiff discounted the drafts in question, did you know that A. F. Smith & Co. were proprietors of an elevator at Oswego?

A. I did not.

Q. Did you at that time know that one of the officers of the Merchants' Bank at Watertown was interested in an elevator at Oswego?

A. I did not.

Q. Have you produced to the commissioner all correspondence between the plaintiff and the Merchants' Bank at Watertown, in relation to the grain in question?

A. I think I have produced everything except the letters enclosing the protested drafts, and those I will produce.

Q. Did plaintiff receive from any source notice of the arrival at Oswego of any of the three cargoes in question?

A. Plaintiff did not.

Redirect examination:

Q. When, or about when, was the demand made upon the Merchants' Bank for the wheat in question?

A. Personally I do not know that any demand was made upon the bank for the wheat; between the 20th and the 25th of October I understood from Mr. Nash, president of the plaintiff, that such a de-
26 mand was made; Mr. Nash was in Oswego at about that time; I learned it from Mr. Nash after his return from Milwaukee.

Q. Were you in Oswego in September or October, 1869?

A. I have never been in Oswego.

Q. Did the plaintiff ever transmit to A. F. Smith & Co. any bill of lading of either of the three cargoes in question?

A. The plaintiff never did.

Q. What correspondence, if any, did the plaintiff have with A. F. Smith & Co. in relation to these cargoes?

A. Plaintiff never had any correspondence with A. F. Smith & Co. in relation to these cargoes.

W. G. FITCH.

Said witness, W. G. Fitch, being recalled February 26, 1870, by defendants' counsel, testified as follows:

Cross-examination by defendants' counsel:

Q. Do you know, or have you ever heard, that any of the officers of the Merchants' Bank at Watertown were interested in an elevator at Oswego?

A. I do not know and have not heard, nor did the plaintiff nor any of its officers, to my knowledge.

Q. How long has the firm of W. P. McLaren & Co. kept an account at plaintiff's bank?

A. I think about six years.

Q. What has been the character of their business during that time?

A. I think exclusively commission business. When W. P. McLaren & Co. opened their account with plaintiff's bank we knew what their business was.

W. G. FITCH.

The plaintiff's counsel next read in evidence from the deposition of WILLIAM P. MCLAREN, of the city of Milwaukee, and State of Wisconsin, taken in this cause on the 18th, 19th, and 24th days of February, A. D. 1870, on due notice to the attorney of the defendants, before said U. S. commissioner, as follows:

WILLIAM P. MCLAREN, being first duly sworn, doth depose and say:

I live in Milwaukee, Wisconsin; I am thirty-six years old; I am a produce-commission merchant, and one of the firm of W. P. McLaren & Co.

Q. Did the firm of W. P. McLaren & Co. ship or order to be shipped, on board of the schooners Kate Kelly, Granada, and Corsican, any and what quantity of wheat from the elevators of Angus Smith & Co., in the city of Milwaukee; and did said firm receive bills of lading from the captains of said vessels, in and during the month of September, 1869?

A. We did ship on the 1st of September, 1869, by the schooner Kate Kelly, 14,254 20-60 bushels wheat, of which was shipped from elevator A, 9,455 5-60 bushels, and from elevator B, 6,799 15-60 bushels; and on the 11th of September, 1869, we shipped by the schooner Granada 14,500 bushels of wheat, of which 9,202 10-60 bushels came from elevator A, and 5,297 50-60 bushels from elevator B; and on the 25th of September, by the schooner Corsican, we shipped 13,400 bushels wheat, of which 7,036 bushels came from elevator A, and 6,364 bushels came from elevator B. We received in each case (3) bills of lading, an original duplicate and triplicate, from the captains of the respective vessels.

Q. What did your firm do with these bills of lading?

A. We retained the duplicates and triplicates, and gave the originals to the plaintiff in this cause, attached to certain drafts, for discount, drawn by the firm of W. P. McLaren & Co. on A. F. Smith & Co., of Oswego, N. Y.

27 Q. Did the bank, the plaintiff, discount for your firm those drafts?

A. They did.

Q. State whether or not your firm insured those cargoes of wheat?

A. They did.

Q. Where was that wheat purchased, and by whom purchased, to go on board said vessel?

A. It was purchased here in Milwaukee, by the firm of W. P. McLaren & Co.

Q. Who paid for the wheat at the time of the purchase?

A. My firm.

Q. State what document or documents of title your firm obtained of the wheat at the time of its purchase and delivery.

A. We received from the sellers warehouse-receipts for the grain. We gave to the sellers our checks on the bank in payment. We handed the warehouse receipts into the office of the proprietors of the different elevators, and received from them orders on the different elevators for

the shipment of the corresponding different quantities and qualities of wheat into the vessels designated. We give those orders to the vessels, or their agents, and receive back, when the vessels are loaded, tickets signed by the foreman of the elevators, stating the quantity and quality of wheat each vessel has taken. My firm keep blank forms of bills of lading. The bills of lading are generally signed in our office, and delivered by the captains of the vessels there.

Q. Was that the way, in these particular cases, that the wheat was put on board the vessels, and the bills of lading executed and delivered?

A. It was so in every respect in all the cases; except, perhaps, the the bills of lading of the schooner Granada may have been signed in Captain Fitzgerald's office.

Q. If the Granada's bills of lading were signed in Capt. Fitzgerald's office, how happened they to have been so?

A. Because the vessel may have been delayed in loading until an hour later than our office was opened; and R. P. Fitzgerald & Co. being the agents of the vessel, the bills of lading may have been left there for signature, as is usual in such cases. If this were the case, the bills of lading were handed to us by R. P. Fitzgerald & Co.

Q. Were you in the city of Oswego, State of New York, in the month of October, 1869?

A. I was.

Q. Were you in the elevator or warehouse in that month, in the city of Oswego, known as the "Corn Exchange elevator?" If so, state at or about what time in said month you were there.

A. I was there from about the 20th to the 25th of October, 1869.

Q. For what purpose were you there at that time?

A. To look for grain which I was informed had been stored in that elevator.

Q. Was you looking for the grain represented by, or called for by the bills of lading of these vessels, the Corsican, Kate Kelly, and Granada, as well as other vessels?

A. I was.

Q. State whether or not you found the grain.

A. I found no wheat in the elevator.

Q. Did you make any demand on A. F. Smith & Co. for this wheat?

A. I did; he did not deliver it to me.

The defendants' counsel here read from the cross-examination of this witness as follows:

28 Cross-examination by defendants' counsel:

Q. How long have you known A. F. Smith & Co., of Oswego?

A. I have had business acquaintance and correspondence with them since some time in the year 1868; cannot state exactly what date. I never met either of them personally until some time in October, 1869.

Q. When did you first learn that they were the proprietors of the Corn Exchange elevator at Oswego?

A. I was never aware of the fact that they were the full proprietors, but had supposed that they were part owners of the elevator since, probably, about a year before this happened; some time in the year 1868.

Q. Did you receive an order from A. F. Smith & Co. to buy the grain in question? If yea, please produce it.

A. I produce letter and telegram, both dated August 28, 1869.

Q. Did you exhibit this authority to the plaintiff?

A. I did not.

A. Are the letter and telegram, produced by you, in cipher to any extent? And, if so, please render the same into common English.

A. They are, and I will decipher them. The letter hereto attached, marked "Exhibit No. 2," is the original referred to, and over the words in cipher I have written the translation in English. The telegram hereto attached, marked "Exhibit No. 3," is the original telegram referred to, and over the words in cipher I have written the translation in English. On the strength of the letter and telegram marked Exhibits Nos. 2 and 3, I bought the cargo, and shipped per sch'r Kate Kelly; the same cargo of the sch'r Kate Kelly referred to in my direct examination, except the 2,000 bushels hereinafter stated.

The said Exhibits 2 & 3 were read in evidence as follows, by defendants' counsel:

Exhibit No. 2, (McLaren.)—Jos. Colt, Special Commissioner.

[Office of A. F. Smith & Co., proprietors of the Corn Exchange elevator, commission merchants for the sale of all kinds of State, western, and Canada grain.]

OSWEGO, N. Y., *Aug.* 28, 1869.

Messrs. W. P. McLAREN & Co., *Milwaukee:*

GENTS: We gave you an order to buy cargo, Africa, (No. 1 spring wheat,) Ramrod, (ship per propeller,) about said freights; draw as before, Merchants' Bank. Also, Poorly, (20,000 bushels,) Arabia, (No. 2 spring-wheat,) Seller Thorn, (all September delivery,) scent, (draw for what margin you require,) on latter here. We are almost entirely out of wheat; need some just as soon as we can get it; but don't want to pay much more fr't by prop. than sail; not over 1 c., any way; your despatch says, Arabia, seller, Sept., $1.20. If we can get our friends to take some at about that p. you may hear from us again soon. Some think it low now; we think it lower than it was.

Yours, truly,

A. F. S. & CO.

29 *Exhibit No. 3, (McLaren.)—Jos. Colt, Special Commissioner.*

THE WESTERN UNION TELEGRAPH COMPANY.

The rules of this company require that all messages received for transmission shall be written on the message-blanks of the company, under and subject to the conditions printed thereon, which conditions have been agreed to by the sender of the following message.

W'M ORTON, *Pres't,*
O. H. PALMER, *Sec'y,*
New York.

ANSON STAGER, *Gen'l Sup't, Chicago, Ill.* (108)
Dated Oswego, August 28, 1869.
Received at.

To W. P. McLAREN & Co.:

Buy cargo Africa, (No. 1 spring-wheat,) Ramrod, (ship by propeller,) about sail freight. Draw as before, Merchants' Bank. Also, Poorly, (20,000 bush.,) Arabia, (No. 2 spring-wheat,) Seller Thorn, (all Sept'r delivery,) scent; (draw for what margin you require,) on latter here.

A. F. SMITH & CO.

21 286 pd.

Cross-examination continued:

The cargo of sch'r Kate Kelly, last above referred to, was purchased August 30 and 31, 1869.

Q. Did you send A. F. Smith & Co., at Oswego, an invoice of the purchase of the cargo of the schooner Kate Kelly; and, if yea, will you please produce the same, or a copy thereof?

A. We sent A. F. Smith & Co. an invoice, and I her' produce a copy thereof, marked Exhibit No. 4, which is attached hereto and forms part of my deposition.

Defendants' counsel read in evidence the invoice, as follows:

Exhibit No. 4, (McLaren.)—Jos. Colt, Special Commissioner.

Account purchase of 14,250 20-60 bus. wheat, bo't for account, and by order of Messrs. A. F. Smith & Co., Oswego, N. Y., through W. P. McLaren & Co.

Aug. 30.	Bo't 2,000	bus.	No. 2, Clarkson, @ 1.25	$2,500 00		
	1,000	"	2, V. & McG., @ 1.25	1,250 00		
	1,000	"	2, Hodges, @ 1.25	1,250 00		
	371.10	"	2, H. & M., @ 1.25	463 96		
	306.50	"	2, Eliot, @ 1.25	383 54		
	2,000	"	2, Murison, @ 1.26	2,520 00		
	1,000	"	2, Bergenthal, @ 1.26	1,260 00		
31.	325	"	2, Knowles, @ 1.28	416 00		
	724	"	2, Russell & Co., @ 1.28	926 72		
	8,727	"	2,			$10,970 22
30 30.	347.30	"	1, Mc. & B., @ 1.28	444 80		
	310.50	"	1, Eliot & Co., @ 1.28	397 87		
	340	"	1, Z. B. & Co., @ 1.28	435 20		
	306.20	"	1, C. & B., @ 1.28	392 11		
	231.20	"	1, Ray & S., @ 1.18	424 11		
	298.10	"	1, V. & McG., @ 1.28	381 65		
31.	326.20	"	1, Mc. & B., @ 1.30	424 23		
	32.30	"	1, Bergenthal, @ 1.32	42 90		
	320	"	1, Watson, @ 1.32	422 40		
	683.40	"	1, Eliot & Co., @ 1.32	902 44		
	2,230.40	"	1, A. S. & Co., @ 1.33	2,966 79		
	5,527.20					7,234 50
						$18,204 72

CHARGES.

Paid inspection, 30c		4 28	
" storage, 2c		285 08	
" insurance, $12,200, @ 250.17 } 6,000, @ 250.08 }		25 54	
" interest, $12,200, 3 days, 10.17 } 6,000, 2 " 3.33 }		13 50	
" marine ins., $24,000, @ 4c		96 00	
" stamps on time-d'ft		7 50	
Commission, 1c		142 54	
			574 44
			$18,779 16

CREDIT.

Sept. 2.	By d'ft at 45 d. d.			$7,500 00	
	" interest,	$100 00			
	less ½ ex.	56 25		156 25	7,343 75
	" " @ 30 d-d			7,500 00	
	½ ex.	56 25			
	less int.	68 75		125 00	7,375 00

" " @ s't	4,080 81	
less ½	20 40	4,060 41
		$18,779 16

E. & O. E.
Milwaukee, 2 Sept., '69.

W. P. McLAREN & CO.

(Endorsed:) Exhibit No. 4, McLaren.

Q. When did the Kate Kelly leave the port of Milwaukee?

A. I could not say.

Q. Did you receive notice of the arrival at Oswego of the cargo of the schooners Kate Kelly, Granada, and Corsican, in question, or either of them; if yea, from whom?

A. I think A. F. Smith & Co. informed us of the arrival of the Kate Kelly at Oswego; but, as near as I recollect, of neither of the others.

Q. Did you know in what elevator the cargo of the Kate Kelly would go on her arrival at Oswego?

A. I did not.

Q. How many cargoes in all, since you began doing business for A. F. Smith & Co., have you purchased and shipped for them?

31 A. I should think about 14.

Q. Have you obtained advances on most of these cargoes from the Milwaukee banks?

A. We have upon all of them.

Q. State from what bank or banks those advances had been procured?

A. From the National Exchange Bank of Milwaukee, the plaintiff in this suit.

Q. Were the cargoes referred to principally previous to the purchase of the cargo of the Kate Kelly?

A. Yes.

Q. At what elevator at Oswego were such cargoes generally unloaded?

A. I have no means of knowing, not having been in Oswego during the entire time.

Q. Will you please produce invoices sent A. F. Smith & Co. of the cargoes per Corsican and Grenada, together with any and all dispatches received by you from them in relation thereto?

A. I produce copy of invoice of Grenada, marked Exhibit No. 8, and copy of invoice of Corsican, marked Exhibit No. 9.

The same were here read in evidence by defendants' counsel, as follows:

Invoice of Grenada.

Exhibit No. 8, (*McLaren*)—*Jos. Colt, Special Commissioner.*

Account purchase of 14,500 bus. wheat bo't for account, and by order of Messrs. A. F. Smith & Co., Oswego, N. Y., through W. P. McLaren & Co.

Sept. 8,	Bo't	665-50 bus.	No. 1, C. & Brown, @ 1.29	$858 92
9,		1,000 "	1, K. & M., @ 1.29	1,290 00
		290.10 "	1, B & E, @ 129	374 31
		651.16 "	1, Z. B. & Co., @ 1.29	840 00
		345.50 "	1, K. & M., @ 1.29	446 13
		347.20 "	1, Bergenthal, @ 1.29	448 06
		642.40 "	1, C. & Brown, @ 1.29	829 04
		1,000 "	1, N. & McG., @ 1.29½	1,295 00
		278 "	1, Eliot & Co., @ 1.29	370 23
		321.40 "	1, Ray & S., @ 1.29	414 95

	3,279.30	"	1,	A. Murison, @ 1.29½	4,246 95	
	253.20	"	1,	E. Sanderson, @ 1.29	326 80	
	305.20	"	1,	S. Brown, @ 1.29	393 88	
	70.10	"	1,	Hodges, @ 1.29	90 51	
	986.30	"	1,	C. & B., @ 1.29	1,272 59	
10	1,000	"	1,	Hodges, @ 1.29½	1,295 00	
	725.50	"	1,	Z. B. & Co., @ 1.29	936 33	
32	291.30	"	1,	Hodges @ 1.29	376 04	
	324.50	"	1,	B. & E., @ 1.29	419 04	
	1,000	"	1,	V. & McG., @ 1.27½	1,295 00	
	21.50	"	1,	Borchert, @ 1.21	28 17	
	689.30	"	1,	Bergenthal @ 1.29½	892 91	
	14,500	"	1,			$18,739 86

CHARGES.

Paid storage, 2c	$290 00	
" inspection, 30c	4 35	
" insurance, 13,500 @ 250-17, 22.95		
5,200 @ 250-17, 8.85	31 79	
" interest $860, 5 days, $1.19		
12,640, 4 " 14.04		
5,240, 3 " 4.36	19 26	
Marine ins., 25,000 @ 70c	175 00	
Stamps on time-d'fts, $16,000	8	
Commission, 1c	145 00	
		673 73
7		$19,413 59

CREDITS.

Sept. 13.	By d'ft at 45 d-d	$8,000 00		
	Less interest	$106 66		
	Ex. ⅔	60 00	166 66	$7,883 34
"	" " 30 d-d		8,000 00	
	Less interest	73 33		
	Ex. ⅔	60 00	133 33	7,866 67
	By proceeds d'ft for margins		2,500 00	2,487 50
	" d'ft a. s.		1,232 24	
	" less ½		6 16	1,226 08
				$19,413 59

E. & O. E.
Milwaukee, Sept. 13, 1869.

W. P. McLAREN & CO.

(Endorsed:) Exhibit No. 8, McLaren.

Invoice of Corsican.

Exhibit No. 9, *(McLaren.)—Jos. Colt, Special Commissioner.*

Account purchase of 13,400 bus. wheat bo't for account, and by order of Mess. A. F. Smith & Co., Oswego, N. Y., through W. P. McLaren & Co.

Sept. 24.	Bo't 3,000	bus. No.	1,	C. Deck @ 118	$3,450 00	
	" 2,000	"	1,	C. & B. @ 118	2,360 00	
	" 1,000	"	1,	Clarkson @ 118	1,180 00	
	" 1,000	"	1,	Z. B. & Co. @ 118	1,180 00	
25,	" 1,000	"	1,	A. M. @ 117½	1,175 00	
	" 1,000	"	1,	Z. B. & Co. @ 117½	1,175 00	
33	" 1,000	"	1,	Hodges @ 117½	1,175 00	
	" 1,000	"	1,	Ray & S. @ 117½	1,175 00	
	" 1,000	"	1,	V. & McG. @117½	1,175 00	
	" 648	"	1,	B. & E. @ 117½	761 40	
	" 323.40	bus. No.	1,	West & F. @ 117½	380 31	
	" 428.20	"	1,	C. B. & Co. @ 117½	503 29	
	13,400	"	1,			$15,780 00

CHARGES.

Paid inspection, 30c	$4 02	
" storage, 2c	268 00	
" insurance, $15,800, @ 250.8	10 72	
" interest, $8,260, 3 days, 6.88		
7,520, 2 " 4.18	11 05	
" stamps on time-d'ft	6 60	
" marine insurance, $18,760, @ 50c	93 90	
" commission, 1c	134 00	
		$528 20
		$16,308 20

CREDIT.

Sept. 27.	By d'ft at 45 d-d		$6,600 00	
	less int.	$88 00		
	1 per cent. ex	66 00	154 00	$6,446 00
"	" at 30 d-d		6,600 00	
	less int	60 50		
	less ex., 1 per ct	66 00	126 50	6,473 50
"	" draft a. s., for		3,422 93	
"	" less exch., 1 per cent		34 23	3,388 70
				$16,308 20

E. & O. E.
Milwaukee, Sept. 27, 1869.

W. P. McLAREN & CO.

(Endorsed:) Exhibit No. 9, McLaren.

Q. Please produce all communications received from A. F. Smith & Co., relating to the purchase of the schooners Kate Kelly, Corsican, and Grenada, or either of them.

A. I hand to the commissioner two sheets marked Exhibit No. 10, containing extracts enclosed in quotation marks, copied from letters of A. F. Smith & Co. to our firm, which contain everything in said letters of importance, relating to the purchase of said cargoes.

The same, marked Exhibit No. 10, was read in evidence, as follows:

Exhibit No. 10, (*McLaren.*)—*Jos. Colt, Special Commissioner.*

(Telegram.)

OSWEGO, 28 *Aug't*, 1869.

"By cargo Africa, (No. 1 spring wheat,) Ramrod, (ship by propeller,) about sail, freight, draw as before, Merchants' Bank."

(Telegram.)

OSWEGO, 30 *Aug.*, 1869.

"Ship soon as possible, cargo Africa, (No. 1 spring wheat,) and cargo Arabia, (No. 2 spring wheat,) sail, look well to quality, draw as before."

This refers to same order, as we telegraphed them that it was almost impossible to get No. 1 wheat.

(Letter.)

OSWEGO, 30th *Aug't*, 1869.

"After referring to telegram of same date, they write: We
34 want this for our trade, and we say, look well to quality, because

there has been very much inferior wheat shipped from Milwaukee, and yet inspected one (1) and two (2) lately, to what there was earlier in the season. You will draw as before, margin, sight, bal'ce, thirty (30) and forty-five (45) days, Merchants' Bank, Watertown."

(Letter.)

OSWEGO, *1st Sept.*, 1869.

"You may buy another cargo of No. 1 for our local trade, if possible, of the old wheat, for we shall want it before the new can be ground. If, however, it is difficult to get all No. 1 at once, fill load with part No. 2, and bulkhead, as this last cargo; No. 1 will suit best, if not over 3 to 5 cts. dearer."

Finding it impossible to get No. 1 promptly, we shipped on first order, the cargo Kate Kelly, part No. 1 and part No. 2, loaded 2 Sept., and could not find No. 1 enough to do anything more on second order.

(Letter.)

OSWEGO, *6th Sept.*, 1869.

"If you have not filled the other order for the other load, please do so. Make it all No. 1 if possible to do so, and not be obliged to wait until freights advance to fill up."

(Letter.)

OSWEGO, *7th Sept.*, 1869.

"We think that with the increase in freight, ins'ce, &c., it will be well for us to put in a cargo or so more, for our local trade now; you may therefore fill the order immediately, and engage freight."

(Letter.)

OSWEGO, *9th Sept.*, 1869.

"Fill up the load No. 1, and let it come without hanging. If the schooner Grenada is there, would sooner load her than a strange vessel."

In pursuance of this order, we bought and shipped cargo No. 1 wheat, per sch'r Grenada, 13th Sept., 1869.

(Letter.)

OSWEGO, *22d Sept.*, 1869.

"We feel considerably like taking another cargo No. 1 for our trade, and if freights are no higher than 12c., and you can draw as before, you may buy and ship another cargo; draw through Merchants' Bank."

Q. Have you produced to defendants' counsel originals, or copies of all copies sent by your firm to A. F. Smith & Co., relating to the purchase or shipment of the cargoes of the Kate Kelly, Corsican, and Grenada, or either of them?

A. I have of everything, unless it may be of some telegram of which I have preserved no copy; I have no recollection, however, of any such dispatches.

Q. Did you send any bill of lading, or copy of bill of lading of either of the three cargoes, Kate Kelly, Corsican, and Grenada, to A. F. Smith & Co.?

A. We did not.

Q. Please prepare extracts from all letters and telegrams, or copies thereof, from your firm to A. F. Smith & Co., relating to the purchase or shipment of the cargoes of the Kate Kelly, Corsican and Grenada, or either of them.

A. I will do so, and hand to the commissioner the same, to be marked Exhibit No. 11.

The defendants' counsel here read in evidence Exhibit No. 11, as follows:

35 *Exhibit No.* 11, (*McLaren.*)—*Jos. Colt, Special Commissioner.*

No. 1.

AUGUST 28, 1869.

"Your dispatch ordering purchase cargo No. 1, shipped by propeller, and 20,000 bushels No. 2, seller, September, came in this p. m. Owing in part to a steamer excursion on the lake this afternoon, there has not been any market this p. m., and business has been entirely adjourned over till Monday. Propellers ask 16 cts. freight; an absurd figure, we think, but the N. T. Co. have no opposition, and are perfectly arbitrary. As we have before advised, No. 1 is exceedingly scarce, and it would take us a day or two to pick up a cargo, but it could probably be done within that time. No propeller could be had before Wednesday, but a small-sized sail-vessel could be had, probably 10½ cents freight. We advise you in regard to this by night message as fully as possible, and will execute the order for seller's option early Monday. We think it not unlikely we could get consignments of a 5,000 lot of No. 2, to help make up a cargo by sail. The owner thinks some of shipping, but not certain."

AUGUST 30, 1869.

"Your telegram in reply to our message Saturday night came to hand this a. m. We have to ask for some allowance if we cannot handle orders as promptly as usual, as it is the hardest time in the whole year to do anything, and there is hardly wheat enough here to keep deliveries moving. Out of our stock we have two houses (with considerable in them) where we would not buy for shipment, so that it takes some time to operate judiciously. On looking into the exact position, we have decided that it is not likely that we could buy a cargo of No. 1 wheat so as to get it shipped this week, and as there were orders for two more cargoes here this morning, No. 2 is by no means plenty, either. We therefore have decided to charter a good-sized vessel and put in, say, 4,000 or 5,000 bushels No. 1, with a bulkhead, and the balance of No. 2, and have been judiciously picking up both qualities during the forenoon. Have bought so far some 6,000 bushels No. 2, at 1.25–26, and 2,000 No. 1, at 1.28. We cannot get any more No. 1 to-day, but will increase our purchase of No. 2, and telegraph charter, &c. We have given our friend the privilege of putting in 4,000 or 5,000 No. 2 on consignment, which he is to decide this p. m., this being, as we suppose, in accordance with your wishes."

AUG. 31, 1869.

"We sent you a message this noon that the foreign news had excited the market, and prices were higher; that we had completed your cargo, at about 1.32 for No. 1, and 1.28 No. 2, and bo't 5,000 No. 2, seller Sept., at 1.24, now asking 1.26. The foreign news (private cable 917) decided the market early, and as buyers were much more plenty than sellers, it was not easy to do anything. As advised yesterday, we had bo't every bushel of No. 1 offered for sale, and we only found one car this a. m., at 1.30, which we took, and at noon paid 1.32 for a few cars more. We still lack 3 or 4 cars, but will no doubt be able to secure them this p. m. We bo't enough No. 2 to fill vessel up, at 1.28, (between 1 and 2,000 bush.,) and took 5,000 at 1.24 for Sept. The report that N. Y. was 4 and 6 cts. better stimulated the market, and we closed strong at 1.28½ cash, and 1.26 seller Sept., for No. 2. No. 1, cash nominal; none here; seller Sept., 1.28. We will get the Kate Kelly off in the morning, if all is well."

SEPT. 1, '69.

"The Kate Kelly is just finishing, and we expect to send you invoice, &c., by next mail."

36 SEPT. 2, '59.

"We enclose invoice of Kate Kelly cargo, and have drawn as noted. We also draw $2,400 on the 2,000 bus. consigned."

SEPT. 4, '69.

"The Kate Kelly's No. 1 wheat is about half old and half new; the No. 2 all old, but we could not now buy any old No. 1, and No. 2 is getting worked down in stock."

SEPT. 8, '69.

"We will also go on with another cargo, as ordered in your letter. It will be difficult to get much No. 1, and we will have to bulkhead, in order to get cargo at all promptly. Our friend Morrison wants to ship a few thousand more, and presume you will not object. He will draw as before, but our banks are beginning to feel the pressure for money to go into the country, to move the wheat, and the time is no doubt coming when they will expect to do less, and shorter time paper. We will, of course, do all we can at any time, and think we can almost always carry a fair portion of the cost of cargoes, at least long enough to get them to their destination, and this, our bankers think, is doing their share."

SEPT. 9, 1869.

"We have advised you, to-night, of the purchase of cargo No. 1, and the chartering of a vessel. She is the Grenada, 14,500 bus. capacity, to load this week, to-morrow if possible. When we commenced this cargo we fully expected to bulkhead, as we were afraid No. 1 was not in sufficient quantity to enable us to make an entire load of that grade, but, fortunately, we were the only buyers; and it being plentier than we supposed, although really scarce, we have bought between 10 and 11,000 bus., costing 1.29 and 1.29½. A report has been rec'd of a break in the Welland Canal, which would take a week to prepare. The captain of the Kate Kelly telegraphed here to get leave to transfer the cargo to the Welland Railway, but as her owner lives in Oswego, we told the agent to telegraph him to see you, as you were the best judges of the

expediency of transshipment. We found, however, that a good many cargoes were being ordered transshipped, and we accordingly telegraphed you, that it seemed to us doubtful whether anything would be gained by this operation, as the large business necessarily caused by the transshipment of several cargoes would probably occasion as much delay to your cargo as it would experience by waiting until the canal was repaired, and the vessel go through, although, as previously remarked, the captain telegraphed that a week would be necessary. Such men usually exaggerate, and we hope it will be repaired sooner."

SEPT. 11, '69.

"We have just (5 p. m.) got the bill of lading of the Grenada, and will draw and send invoice on Monday. Her cargo is very nice, and having a little mixture of old wheat will not harm it at all. We will allow for the margin on the 20,000 option in drawing for this cargo, although we will have to let most of the trade run for the present."

SEPT. 13, '69.

"We inclose invoice of cargo schooner Grenada, which sailed Saturday, p. m., and have to advise our drafts on you as noted. The sample goes by express to-day, and we think will suit. It weighs 59½ pounds full, and is choice wheat in every respect. Mr. Morrison decided not to ship any in this cargo, but will probably ship a full cargo soon."

SEPT. 17, '69.

"Your dispatch announcing arrival of Kelly we replied to last night. Morrison thought, as it was most all old wheat, it ought to bring at least 1.40, but desired to leave it to your judgment."

37 SEPT. 24, '69.

"Our banks are getting closer daily in money matters, but we have made arrangements to ship another cargo, as you wished us to do so, on time, as before."

SEPT. 25, '69.

"The Corsican clears to-night, but too late to finish invoice till next mail."

SEPT. 27, '69.

"Enclosed find invoice cargo Corsican, and we advise our drafts on you to-day, as noted. The rate of each may look high, but the rate is bid up by others trying to get accommodation outside of their own banks. Marine insurance, you will note, is low, and we think the price of the wheat cannot be unprofitable."

AUG. 28, '69.

Propellers ask heyday, (16 cts.) Africa, wagon, (No. 1, stock quite small,) would take day or two to buy, without exciting market. Refuge, (we can ship sailing vessels at) Henepen, (10½.) If you Rancid, (ship by sailing vessels,) might possibly consign poetry (5,000,) Arabia, (No. 2,) but uncertain. Business suspended since noon. Will you buy them (all Sept. delivery,) Monday? Last sales Arabia, (No. 2,) Alluse half (1.25½.) Theory (first half Sept. delivery,) allied (1.24.) Heavy rains all over West, but now clear again."

"Africa (No. 1,) almost wall, (stock entirely exhausted.) Arabia (No.

2) scarce. Reward (we have chartered vessel) helper (10 cts.) capacity pomade, (16,000 bus.) bulk-head poetry (5,000) Africa (No. 1,) balance, Arabia (No. 2,) mostly bought No. 2, (Arabia,) Alluse (1.25,) Almond, (1.26,) Africa, (No. 1,) Aloes (1.28.)"

AUG. 30, '69.

"Latch (foreign news has stiffened the market) season. (Market closes steady and prime, at quotations,) cargo completed."

SEPT. 8.

"Letter 6th received; will go on buying cargo Africa, (No. 1.)"

SEPT. 9, '69.

"Parrot (we have bought,) about point (10,000) Africa (No. 1) aloft (1.29) to half reward, (we have chartered vessels,) capacity poker, (14,000 bus.) herbs (12 cts.) Regard (we will ship as soon as possible) all Africa, (No. 1.)"

Q. Will you furnish statement, showing date of all purchases of cargoes made by your firm for A. F. Smith & Co., names of vessels upon which the same was shipped, amount of advances obtained upon each shipment at Milwaukee, and the name of the bank or banks upon which such advances were obtained?

A. I will, and hand to the commissioner the same to be marked Exhibit No. 12. The defendants' counsel here offered to read in evidence said Exhibit No. 12, of which the following is a copy, containing statements of purchase of fourteen cargoes for account A. F. Smith & Co.

Exhibit No. 12, (McLaren.)—Jos. Colt, Special Commissioner.

SEPT. 11–12, 1868.

Bo't ac. A. F. Smith & Co., 16,814 30-60 bus. No. 1 wheat. (Shipped per schooner "Charger.")

Sept. 15. Received advances:			
Sight draft,	$7,270 59	$7,234 24	
15 d. d.	7,331 36	7,150 00	
30 d. d.	14,523 92	14,300 00	
		$28,684 24	

38 SEPT. 29TH, 1868.

Bo't ac. A. F. Smith & Co., 17,500 bus. No. 2 wheat. (Shipped per sch'r Cortez.)

Oct. 1. Rec'd advances:		
Sight draft	$25,323 72	$25,199 09

OCT. 8, 1868.

Bo't ac. A. F. Smith & Co., 18,000 bus. No. 2 wheat. (Shipped per sch'r Camanche.)

Oct. 13. Received advance:		
Sight draft	$25,631 44	$25,567 36

MAY 7-21, 1869.

Bo't ac. A. F. Smith & Co., 17,205-20 bus. No. 3 & Rig. wheat. (Shipped per sch'r Delos De Wolf.)

May 22. Rec'd advance:			
Sight draft		$19,126 23	$19,054 51

MAY 20, 1869.

Bo't ac. A. F. Smith & Co., 17,500 bus. No. 1 wheat. (Shipped per sch'r Elvina.)

May 24. Sight draft		$21,216 10	$21,135 54

JUNE 7, 1869.

Bo't ac. A. F. Smith & Co., 5,600 bus. No. 1 wheat. (Shipped per sch'r William Raynor.

June 8. Sight draft		$1,102 31	$1,096 80
30 d. d. "		2,800 00	2,753 33
45 " "		2,800 00	2,741 67
			$6,591 80

JUNE 4, 1869.

Bo't ac. A. F. Smith & Co., 8,500 bus. No. 1 wheat. (Shipped per sch'r Kate Hinchman.)

June 11. Rec'd advance:			
Sight draft		$1,709 70	$1,701 15
30 d. d. "		4,250 00	4,179 16
45 " "		4,250 00	4,161 45
			$10,041 76

JUNE 10-11, 1869.

Bo't ac. A. F. Smith & Co., 14,500 bus. No. 1 wheat. (Shipped per sch'r Quickstep.)

June 11. Rec'd advance:			
Sight draft		$3,051 55	$3,036 29
30 d. d. "		7,250 00	7,129 16
45 " "		7,250 00	7,098 97
			$17,264 42

JULY 23, 1869.

Bo't ac. A. F. Smith & Co., 17,000 bush. No. 2 wheat. (Shipped per sch'r Knight Templar.)

July 24. Rec'd advance:			
Sight d'ft		$24,587 53	$24,464 59

39 JULY 23D, 1869.

Bo't ac. A. F. Smith & Co., 17,000 bush. No. 1 wheat. (Shipped per sch'r Elvina.)

July 24.	Rec'd advance:		
	Sight draft	$3,862 77	$3,843 46
	30 d. d. "	10,500 00	10,325 00
	45 " "	10,500 00	10,281 25
			$24,449 71

JULY 23, 1869.

Bo't ac. A. F. Smith & Co., 16,000 bush. No. 2 wheat. (Shipped per sch'r Kate Kelly.)

July 27.	Received advance:		
	Sight draft	$3,990 66	$3,970 71
	30 d. d. "	9,500 00	9,341 67
	45 d. d. "	9,500 00	9,302 08
			$22,614 46

AUG. 30, 1869.

Bo't ac. A. F. Smith & Co.:
8,727 bus. No. 2.
5,527-20 bus. No. 1.

14,254-20 bus. shipped per sch. Kate Kelly.

Sept. 2:			
	Sight draft	$4,080 81	$4,060 41
	30 d. d. "	7,500 00	7,375 00
	45 " "	7,500 00	7,343 75
			$18,779 16

SEPT. 8, 1869.

Bo't ac. A. F. Smith & Co., 14,500 bus. No. 1 wheat. Shipped per sch'r Grenada.

Rec'd advance:			
	D'ft margins	$2,500 00	$2,487 40
Sep. 13.	Sight d'ft	1,232 24	1,226 08
	30 d. d. "	8,000 00	7,868 67
	45 " "	8,000 00	7,832 34
			$19,413 59

SEPT. 24-25, 1869.

Bo't ac. A. F. Smith & Co., 13,400 bush. No. 1 wheat. Shipped per schooner Corsican.

Sep. 27.	Rec'd advance:		
	Sight draft	$3,422 93	$3,388 70
	30 d. d. "	6,600 00	6,473 50
	45 d. d. "	6,600 00	6,446 00
			$16,308 20

The advances obtained by us on all of the fourteen cargoes, referred to in this statement, were had from the National Exchange Bank of Milwaukee.

W. P. McL. & CO.

Plaintiff's counsel objected to the reading of all of Exhibit 12 down to the statement of purchase account A. F. Smith & Co. shipped per schooner Kate Kelly, on the ground that it is res inter alios acta not between the parties to this suit, and not between the parties through whom this plaintiff claims title, and is anterior to the transactions which form the subject of this action, and relates to other and different transactions between parties who are not parties to this record, and as such is incompetent to bind or effect the plaintiff in any way.

Defendants' counsel also offered to read in evidence the question and answer.

Q. Have you, in any case, directed captains of vessels upon which advances had been obtained as above, or has any person for you, to your knowledge, to report to the Corn Exchange elevator at Oswego?

A. I have, in several instances, when the captains have asked me in regard to getting an order for the delivery of their grain in some elevator at Oswego, suggested to them that they might enquire at the office of A. F. Smith & Co., to see if they could find any such order, but have never given any other directions, nor do not know of any having been given for us.

(The plaintiff's counsel objected also to the reading of this last question and answer, because the said question and answer call for testimony which is irrelevant and incompetent in this cause; is a transaction between other persons and parties than those in this suit, and relate to other and different transactions; and because it is not shown or attempted to be shown that the plaintiff in this suit had any knowledge of any such direction, if given.

The defendants' counsel insisted upon reading the whole of Exhibit 12 in connection with the last-mentioned question and answer, as tending to bring home to McLaren, the shipper, and the plaintiffs, a knowledge of the mode of doing the business at Oswego, as to the delivery there.

The judge excluded all of Exhibit 12, down to the statement of purchase for account of A. F. Smith shipped per schooner Kate Kelly.

The counsel for the defendants excepted. The judge also sustained the objection of plaintiff's counsel to the reading of said question and answer, and the defendants' counsel excepted.

Defendants' counsel then read in evidence the balance of Exhibit No. 12, not above objected to.

Defendants' counsel read in continuance the further cross-examination of this witness, and the plaintiff's counsel read the redirect.)

Q. Did you obtain the advance, on the three cargoes in question, personally?

A. I think I did.

Q. At what date were the proceeds of the various drafts passed to your credit by the plaintiff?

A. The Kate Kelly's on the 2d of Sept., 1869, the Grenada's, on the 13th of Sept., 1869, and the Corsican's on the 27th of Sept., 1869.

Q. Do you know whether the captains signed the bills of lading on the days they bear date?

A. I presume they did, but cannot say positively. I was present at

the execution of the bills of lading of the Kate Kelly and the Corsican, but cannot remember distinctly as to the Grenada.

Q. During the continuance of your business for A. F. Smith & Co., previous to their failure, have you ever, at any time, had conversation with the plaintiff, or any of its officers, as to where the grain, bought for A. F. Smith & Co., was stored in Oswego?

41 A. I have conversed with Mr. Fitch, the cashier, in reference to the necessity of all possible precaution being taken in connection with the shipments, to prevent the grain going into possession of A. F. Smith & Co., until the drafts were paid, but never to my recollection discussed its going into any particular warehouse.

Q. Did you ever inform the plaintiff, or any of its officers, that you had reason to suppose that grain so advanced upon went, upon its arrival at Oswego, into the Corn Exchange elevator?

A. No.

Redirect examination:

Q. With whom did the firm of W. P. McLaren & Co. make arrangements to transact business for or with A. F. Smith & Co., and where were the negotiations made?

A. I believe my partner got acquainted with one of the firm of A. F. Smith & Co. I think our first business was by letter or telegram. I believe Mr. Davidson, one of our firm, got acquainted with Mr. A. F. Smith at Cape Vincent.

Q. Did A. F. Smith & Co. send any party to Milwaukee in the year 1868, to make business arrangements with your firm? If yea, who was that party, and when, or about when, in the year 1868, was he in Milwaukee for that purpose?

A. In the summer or fall of 1868, and again in the spring of 1869, they sent Mr. Farwell to Milwaukee to attend to their business here.

Q. Did you, or any member of your firm, see Mr. Farwell at those dates in Milwaukee?

A. I did.

(The defendants here objected to the reading of the testimony in the answer to the question, were any arrangements made by Mr. Farwell by your firm to buy wheat in Milwaukee on orders from A. F. Smith & Co.? if yea, state your firm by said fully what arrangements or agreements were made with Farwell; as to the arrangements of drawing time-paper in transactions with Farwell, as to through whom drafts should be sent, &c., and also as to the answer to the next two questions, as not binding on Smith & Co. as to the transaction in question in this case, and not relevant to the transaction in question in this case.

The objection was overruled, and defendants' counsel excepted.

The answer was read by the plaintiff's counsel, as follows:

A. We frequently received orders from Mr. Farwell, while in Milwaukee, to buy and ship grain for A. F. Smith & Co., and acted on his instructions in regard to the buying, shipping, and drawing for the same; we, at different times, discussed the arrangements of drawing time-paper, and when Mr. Farwell desired to designate the banks East through whom such drafts should be sent, we agreed to send them, and consign the property to any good responsible bank Smith & Co. might designate, always stipulating that we should adhere to our positive business rules in such cases, and on no account consent to any property so shipped to pass out of the control of the banks, in whose care it had been placed until all drafts made against it had been paid.)

Q. State whether or not you reserved the right of inquiring as to the standing or responsibility of the banks that he might name.

A. Yes; we stipulated that we should be satisfied as to their standing and responsibility.

Q. Was that arrangement understood between you, your firm, and Farwell, to apply to all purchases and shipments made on the orders of A. F. Smith & Co.?

42 A. The subject was discussed between us both in reference to particular shipments, and also in regard to the general business between our firm and Smith & Co.

Q. State how and why the wheat in question came to be consigned to the care of the Merchants' Bank of Watertown, N. Y.

A. Because Smith & Co. requested that it should be so consigned.

Q. Was any, and what, reason given by A. F. Smith & Co., or their agent, for that request?

A. Yes; we were given to understand that they could procure accommodation from that bank at times when they could not from Oswego banks, and having been acquainted with that bank, and done business with it for many years, while Mr. Smith was in Cape Vincent, they desired to do a portion of their business through it.

Q. Was any inquiry made by your firm as to the standing or character of the Merchants' Bank?

A. Yes; my partner, Mr. Davidson, while in Watertown, in the early spring of 1869, made all the inquiries he could in regard to the standing and position of the bank.

Q. What was the reputation of the Merchants' Bank for ability and integrity?

A. It was very good; it had the reputation of being a strong bank financially.

Q. Did the plaintiff in this suit see, at the time of the taking of the bills of lading in question, the invoices or the letters which you have produced to the commissioner, and attached as exhibits as part of your cross-examination?

A. No.

Q. Was there any wheat loaded, or aboard the schooner Kate Kelly, at the same time that the wheat in question was loaded on board of her, shipped by your firm, and consigned to any other party; and, if so, was a separate bill of lading given by the captain of the Kate Kelly for that wheat?

A. We shipped two thousand bushels of wheat on that vessel, and consigned the same to A. F. Smith & Co., separate bills of lading being given by the captain for the 2,000 bushels; the consignment in the bills of lading being, as I now recollect it, as follows: Ac. W. G. Fitch, cashier, care A. F. Smith & Co., Oswego.

Q. What was the nature of the draft that accompanied that bill of lading?

A. It was a sight draft.

Redirect examination continued, (read by plaintiff's counsel:)

Q. Was the sight draft attached to the bill of lading for the 2,000 bushels paid?

A. It was.

Q. What is the usual length of time of vessels going from Milwaukee to Oswego?

A. I should think they would average ten to fifteen days.

Q. What is the usual length of time for letters sent by mail from Milwaukee to Oswego?

A. Three days.

Q. If the sight drafts were sent by mail, then would they reach Oswego before the lake vessels arrived with the cargoes?

A. Yes; they would.

Q. In your cross-examination you spoke of having received a despatch from A. F. Smith & Co. of the arrival of the Kate Kelly, and of not receiving despatches of the arrival of the Corsican and Grenada; how came you to receive a despatch of the arrival of the Kate Kelly?

43 A. Because we had made an advance on two thousand bushels of wheat, to be shipped and consigned to them; and, by request of the owner of said wheat, (which was loaded on the Kate Kelly,) we had written to Smith & Co. to advise us of the arrival of the wheat, so that we could see the owner, and give them instructions as to its disposal.

Q. Was it usual or customary for A. F. Smith & Co. to notify you of the arrival of vessels where the property was consigned to the care of banks at Oswego, or elsewhere East?

A. It was not.

Q. Did you receive any telegram or telegrams from A. F. Smith & Co. in relation to the 2,000 bushels of wheat put on board the Kate Kelly?

A. Yes, we received several.

Recross-examination (read by defendants' counsel:)

Q. Did your firm pay any freight on the cargoes of the Corsican, Kate Kelly, and Grenada, or any part of those cargoes?

A. We did not.

Q. Did the plaintiff, so far as you know?

A. They did not, so far as I know.

Redirect examination (read by plaintiff's counsel:)

Q. Do the telegraph despatches from A. F. Smith & Co., in relation to the Kate Kelly, refer to the two thousand bushels taken on board for other parties than the plaintiffs?

A. They refer entirely to that portion of the wheat.

Questions by defendants' counsel:

Q. You say in your examination that you had heard that A. F. Smith & Co. were part proprietors of an elevator at Oswego. Did you know, or had you heard, who the other proprietors were?

A. I had understood that two bankers in Oswego were interested in the Corn Exchange elevator as part proprietors—Delos de Wolf and Thomas S. Mott.

Q. Had you heard of any other persons as part proprietors of said elevator?

A. I did not. I had heard reports of changes in the proprietorship of the elevator, but had no definite information as to their nature.

W'M P. McLAREN.

The plaintiff's counsel next read in evidence from the deposition of John F. Moffitt, of Watertown, New York, taken before Alfred B. Getty, United States commissioner at Oswego, on the 28th of April, 1870, in this and five other causes.

To which deposition was attached a stipulation of which the following is a copy:

The stipulation in deposition of John F. Moffitt, as to the taking of the testimony in reference to objections thereto, to apply to all the deposi-

tions taken or to be taken before Commissioner Getty, at Oswego, in all or any or either of the above-entitled suits.

It is further stipulated that, subject to the above stipulation, any deposition taken in any or either of the above suits before said commissioner, may be read in evidence in any other of said suits, or either of them; and further, that the copy annexed to any deposition of any original exhibit produced to any witness may be read in evidence, with the same effect as if such original were annexed, and without requiring the production on the trial of each original; and further, that the copy annexed to any deposition of a letter-press copy produced may be read with the same effect as if such letter-press were annexed, without
44 requiring the production of the same.

Dated at Oswego, May 10, 1870.

H. M. FINCH,
Of Counsel for Plaintiff.
C. VAN SANTVOORD,
Of Counsel for Defendants.

JOHN F. MOFFITT, having been by me first cautioned and sworn as aforesaid, did depose and say as follows, to wit: "My age is twenty-nine years. I reside at Watertown, New York. Watertown is two hundred and sixty miles from New York City. My business, in the month of September, 1869, was cashier of Norris Winslow's bank, of Watertown, under the name of the Merchants' Bank. The place of business of that bank was Watertown. We had no president. It was a private bank under the name "Norris Winslow, banker." That is the only bank known as the Merchants' Bank in Watertown, New York.

Q. Did the Merchants' Bank, at Watertown, New York, receive at any time in the month of September, 1869, from W. G. Fitch, cashier, any drafts drawn by W. P. McLaren & Co. on A. F. Smith & Co., Oswego, New York, with bills of lading attached? If yea, how many drafts; when dated; and the amount; and what bills of lading; and were the same enclosed in letters to said Merchants' Bank? And if you have the original letters enclosing the same, produce them to the commissioner.

(Before answering this question the parties hereto agree that no objections need be noted by the commissioner to the testimony or any part thereof, or to the questions, except as to the form of questions, but that either of the parties can have the right to object, on the trial, to the testimony, or any part of it, as irrelevant, incompetent, and immaterial, or to the relevancy of any instructions, memoranda, or documents.)

A. I received, on or about the 6th day of September last, a letter from the National Exchange Bank of Milwaukee, dated September 2, 1869, containing the drafts, bills of lading, and insurance policies referred to in the letter and relating to the shipment by the Kate Kelly.

The plaintiff's counsel here offered in evidence the letter referred to in the foregoing answer, of which Exhibit No. 5, A. B. G., is a copy, being the same letter of which the foregoing Exhibit No. 10, (Fitch,) is a letter-press copy; and the same was read in evidence, subject to same objection of defendants and reservation as to said Exhibit No. 10, Fitch.

Exhibit No. 5, A. B. G., (Moffitt.)

C. D. NASH, *President.* W. G. FITCH, *Cashier.*

THE NATIONAL EXCHANGE BANK OF MILWAUKEE,
U. S. DESIGNATED DEPOSITORY,
MILWAUKEE, WIS., *Sept. 2d*, 1869.

To CASHIER MERCHANTS' BANK,
Watertown, N. Y.:

DEAR SIR: I hand you for collection and remittance to Mercantile Nat. Bank, New York, for my credit:

W. P. McLaren & Co., on A. F. Smith & Co., Oswego		$4,080 81 and ex.
Do.	do., Oct. 5	7,500 00
Do.	do., Oct. 20	7,500 00

B. L. sch'r Kate Kelly, 8,727 bush. amber Mil. wheat.
" " 5,527 20-60 "No. 1 " "

45 Consigned to your bank for my account and to be held by you subject to the payment of the above drafts.

Insured Northwestern Nat. Ins	$5,000 00
Nat. Ins. Co., Boston	5,000 00
Etna Ins. Co., H'tf	5,000 00
Republic Ins. Co	5,000 00
Security Ins. Co	4,000 00

I consign this wheat to you, to be held as per endorsement B. L., and surrender only on payment of the drafts drawn against it, holding you responsible for the same in case of the non-payment of the drafts. Will you receive consignments in this way, charging reasonably for same?

Yours, truly,

W. G. FITCH.

I have not in my possession the drafts or bills of lading mentioned in that letter. The bank of which I am cashier at one time had the drafts and bills of lading mentioned in that letter in its possession. Those drafts mentioned in that letter were disposed of as follows:

The sight draft of $4,080.81 was paid by A. F. Smith & Co. The draft due October 5th, of $7,500, was paid by A. F. Smith & Co.; and the other of $7,500 was returned to the National Exchange Bank of Milwaukee.

Q. Was the bill of lading and certificate of insurance returned with the last draft mentioned in the letter, Exhibit No. 5, to W. G. Fitch, cashier?

A. I cannot say whether they were returned at the same time or not, but my recollection is that they were. The fact is that they were returned.

Q. Why did you return the last draft mentioned in Exhibit No. 5 to the Milwaukee bank?

A. I returned it because it was not paid.

Q. Look at the paper now shown you purporting to be the draft for $7,500, drawn by W. P. McLaren & Co. on A. F. Smith & Co., dated September 2d, 1869, marked in the margin Exhibit No. 8, F. B., (Exhibit No. 7, Fitch, is a copy,) and state whether that is the last draft mentioned in Exhibit No. 5, and returned to the Milwaukee bank.

A. It is.

Q. In whose handwriting are the words A. F. Smith & Co., across the face in red ink?

A. I should say it was the handwriting of A. F. Smith. I know the handwriting of A. F. Smith.

Q. Will you look at the paper now shown you, purporting to be bill of lading, dated September 1st, 1869, marked in red ink on the face, "Original," with an endorsement in writing on the back purporting to be signed by W. G. Fitch, and state whether that is the bill of lading received by the Merchants' Bank, mentioned in the letter "No. 5?" (Ex. No. 9, Fitch copy.)

A. It is, I think, and have no doubt about it, but I did not mark it.

Q. Where did A. F. Smith & Co. accept this draft shown you?

A. I suppose it was in Oswego. It was in Oswego.

Q. Did you forward the drafts to him for acceptance?

A. I did.

Q. Did you forward anything to him but the drafts at the time you forwarded the drafts for acceptance?

A. Yes, sir.

Q. Did you have any correspondence with A. F. Smith & Co. with reference to this cargo of wheat?

46 A. I had no correspondence with A. F. Smith & Co., but had correspondence with the Corn Exchange elevator.

Q. Have you copies of the letters written by you to the Corn Exchange elevator, with you, in relation to this cargo?

A. I have not. I did the correspondence, and copies of the letters were taken.

Q. Did you send any orders to the Corn Exchange elevator for the captain of the Kate Kelly, directing him what to do with the cargo?

A. I did.

Q. Is the paper "Exhibit No. 2" the order?

A. It is.

Q. Is the signature yours to that paper?

A. It is.

Q. Did you give any other order to the captain of that vessel?

A. No, sir.

Q. Whose handwriting is the body of that order?

A. It is mine.

Q. How was that order sent, where was it sent, and to whom?

A. It was sent by mail; cannot say positively that it was sent with anything else; cannot say it was enclosed in an envelope. We have envelopes in the bank with A. F. Smith & Co. printed on them. I don't know whether the clerk put it in one of those envelopes or in one addressed to the Corn Exchange elevator. It was sent to Oswego at or about the time it bears date.

The plaintiff's counsel here read the order above referred to as Exhibit No. 2, as follows:

NORRIS WINSLOW, *Banker.* J. F. MOFFITT, *Cashier.*

MERCHANTS' BANK,
Watertown, N. Y., Sept. 6, 1869.

ROBERT HAYES, Esq.,
Master schooner Kate Kelly, Oswego, N. Y.:

DEAR SIR: Please deliver to the Corn Exchange elevator, Oswego,

N. Y., your cargo, 8,727 bushels of amber Milwaukee wheat, and 5,527$\frac{30}{60}$ bushels of No. 1 amber Milwaukee wheat, consigned to us by W. G. Fitch, esq., cash.

Yours, respectfully,

J. F. MOFFITT.

Q. Were the drafts returned to your bank after they were accepted by A. F. Smith & Co.?

A. The time drafts always were.

Q. From the time you received the bill of lading until its return to Milwaukee, who had its custody or possession?

A. I did. I held it in the capacity of cashier of the bank.

Q. Who held the certificate of insurance during same time?

A. I did.

Q. Did you acknowledge the receipt of those drafts to the Milwaukee bank?

A. It is our custom to acknowledge receipt of drafts, and it is my impression that I acknowledged these myself. We usually used the printed form for acknowledgments, signed J. F. Moffitt, cashier, printed. In some instances I may have written my name instead of having it printed.

The bank received the letter here produced and marked "Exhibit No. 6," of which a copy, marked No. 6, is hereto annexed, dated Sept. 13, 1869, on or about the 16th of Sept. last, and the drafts and bills of lading and certificate of insurance, as therein stated.

The plaintiff's counsel here offered in evidence the letter referred to in the last answer, of which Exhibit No. 6, A. B. G., is a copy, being the same letter of which the foregoing Exhibit No. 4 (Fitch) is a letter-press copy, and the same was read in evidence, subject to same objection of defendant, and reservation as to said Exhibit No. 4, (Fitch) as follows:

47 *Exhibit No. 6, A. B. C.*

C. D. NASH, *President.* W. G. FITCH, *Cashier.*

THE NATIONAL EXCHANGE BANK OF MILWAUKEE,
U. S. DESIGNATED DEPOSITORY,
Milwaukee, Wis., Sept. 13th, 1869.

MERCHANTS' BANK, *Watertown, N. Y.*

DEAR SIR: I hand you for collection and remittance to Mercantile Nat. Bank, New York, for my credit:

W. P. McLaren & Co. on A. F. Smith & Co.,		Oswego, Oct. 16.	$8,000 00 and ex.
do.	do.	Oswego, Oct. 31.	8,000 00 and ex.
do.	do.		1,232 24 and ex.

B-L. sch. Grenada, 14,500 bush. wheat consigned to your bank for my account, and to be held by you, subject to the payment of drafts drawn against it, as per endorsement of B-L.

Insured Etna Ins. Co., $16,000.

In case of non-acceptance or non-payment, please advise me by telegraph.

V'y truly,

W. G. FITCH.

Q. On the receipt of the drafts, were the same presented to A. F. Smith & Co. for acceptance?

A. They were, and the time drafts were accepted. The sight drafts were either paid or accepted. The sight draft was for $1,232.24, and was paid.

Q. Are the two drafts and the certificates of protest attached, now shown you, the original drafts which came in letter marked "Exhibit No. 6?"

A. They are.

Q. Were they paid at maturity?

A. They were not, and were protested.

The drafts shown to the witness and identified by him are for $8,000 each, dated Sept. 13, 1869, one at thirty days, and the other at forty-five days, signed by William P. McLaren & Co.; marked in the margin "Exhibit No. 1, F. B.," and "Exhibit No. 2, F. B." Exhibits Nos. 1 and 2, Fitch, are copies.

Q. Are the drafts accepted by A. F. Smith & Co.?

A. Yes, sir; but cannot say in whose handwriting, but should think in the handwriting of Mr. Bickford of that firm.

Q. Look at the bill of lading marked "Exhibit No. 3, F. B.," with the word "Original" in red ink on the face thereof, and the endorsement on the back thereof, and state whether it is the bill of lading mentioned in "Exhibit No. 6," and received by the Merchant' Bank. (Exhibit No. 3, Fitch, above, is a copy of said bill of lading.)

A. I believe it to be so, and have no doubt about it.

Q. Did you give any order to the captain of that vessel for the delivery of that cargo?

A. I did. I have a copy of that order.

Q. Is the paper shown you, marked on the back "Exhibit No. 4, A. B. G.," a copy of the order?

A. I think it is, and it is in my handwriting.

(Exhibit No. 4, A. B. G., referred to in the deposition of M. M. Wheeler below.)

Q. Did you deliver to the captain an order of which that is a copy?

A. I did not.

Q. Did you send to the captain an order of which that is a copy?

A. I did not.

Q. How and by whom was that order delivered to the captain?

A. I don't know.

48 Q. What did you do with the order of which you say paper No. 4 is a copy?

A. It was sent by mail to the proprietors of the Corn Exchange elevator, and sent at its date.

Q. In whose hands did the bill of lading of this cargo, from the time you received it until it was returned to Milwaukee, remain?

A. It was in my custody as cashier of the bank.

Q. Did you have any correspondence with the proprietors of the Corn Exchange elevator in reference to this cargo?

A. I did.

Q. Have you that correspondence with you?

A. I have not; I do not know where it is.

Q. Where was it the last you knew anything about it?

A. I have not seen it since I wrote the letter.

Q. Did you receive any letters from the proprietors of the Corn Exchange elevator in regard to this cargo of wheat?

A. I think I did not.

Q. Did you retain copies of the letters you wrote to the proprietors of the Corn Exchange elevator in relation to this wheat?

A. I think there were copies made of those letters.

Q. Have you those copies?

A. No, sir.

Q. Were those copies taken in the letter-book of the bank, and have you that book with you?

A. They were; and I have that book with me.

Q. Will you produce the book?

A. Yes, sir.

Q. Turn to the letters?

A. I have looked for the letters and cannot find them. The leaves on which the letters were are removed from the book.

The Merchants' Bank received the letter here produced and marked "Exhibit No. 7," dated September 28, 1869, a copy of which is hereto attached and marked Exhibit No. 7, on or about October 1, 1869, and the drafts, bill of lading, and certificates of insurance mentioned in the letter.

The plaintiff's counsel here offered in evidence the letter referred to in the last answer, of which Exhibit No. 7, A. B. G., is a copy, being same letter of which the foregoing Exhibit No. 16, Fitch, is a letter-press copy; and the same was read in evidence, subject to same objection of defendants and reservation as to said Exhibit No. 16, Fitch, as follows:

Exhibit No. 7, A. B. G.—(Moffitt.)

C. D. NASH, *President.* W. G. FITCH, *Cashier.*

THE NATIONAL EXCHANGE BANK OF WILWAUKEE,
U. S. DESIGNATED DEPOSITORY,
Milwaukee, Wis., Sept. 28th, 1869.

CASHIER MERCHANTS' BANK, *Watertown, N. Y.:*

DEAR SIR: I hand you for collection and remittance to my credit—

W. P. McLaren & Co., on	A. F. Smith & Co		$3,422 93	& ex.
do.	do.	Oct. 30	6,600 00	ex.
do.	do.	Nov. 14	6,600 00	ex.

B-L., sch. Corsican, 13,400 bush. wheat consigned to you for my account, and to be held by you, subject to the payment of draft, as above.

Insured Security Ins. Co	$4,880
Western Ins. Co	4,880
Home Ins. Co	9,000

In case of non-payment or non-acceptance, please advise me per telegraph.

V'y truly,

W. G. FITCH, *C.*

49 Q. On the receipts of the drafts enclosed in said letter, were the drafts presented to the firm of A. F. Smith & Co. for acceptance, and were they accepted?

A. They were. The sight draft of $3,422.93 was paid, the time drafts accepted and returned by A. F. Smith & Co. to the Merchants' Bank of Watertown.

Q. Are the two drafts now shown you, each for $6,600, one payable thirty days after date, and one forty-five days after date, marked, respectively, "Exhibit No. 11, F. B., No. 12, Fitch," and "Exhibit No. 12, F. B., No.

13, Fitch," with the certificate attached, enclosed in the letter "Exhibit No. 7?"

A. I should say they were. I was the notary who protested them, and it is my certificate attached. The acceptance or signature on the face of the drafts, A. F. Smith & Co., are in the handwriting of Mr. Bickford.

Q. Is the bill of lading shown you, marked "Exhibit No. 14, F. B., No. 14, Fitch," dated September 25, 1869, with the written endorsement on the back thereof, the bill of lading which was sent in the letter marked "Exhibit No. 7?"

A. I believe it to be.

Q. Did you make out an order, addressed to the captain of that vessel, for the delivery of the cargo; if yea, what did you do with the order after it was made out?

A. I did; and sent it by mail to the Corn Exchange Elevator.

Q. Have you a copy of that order?

A. I have.

Q. Will you produce it?

A. I will.

Q. Is it in your handwriting, except the printed portion?

A. It is.

The plaintiff's counsel here read in evidence said copy order, marked Exhibit No. 8, A. B. G., as follows:

Exhibit No. 8, A. B. G.

NORRIS WINSLOW, *Banker.* J. F. MOFFIT, *Cashier.*

MERCHANTS' BANK,
Watertown, N. Y., October 1, 1869.

MASTER SCHOONER CORSICAN,
Oswego, N. Y.:

DEAR SIR: Please deliver to the Corn Exchange Elevator, of Oswego, N. Y., your cargo of 13,400 bush. of No. 1 amber Mil. wheat, for acc't of W. G. Fitch, cash., and subject to our order.

Yours, resp'y,

J. F. MOFFIT, *Cashier.*

Q. Were those time drafts with bills of lading returned by the Merchants' Bank to the plaintiff, the National Exchange Bank of Milwaukee, after payment was refused and they were protested?

A. They were.

(The defendants' counsel read cross-examination.)

Q. Have A. F. Smith & Co. kept an account with the Merchants' Bank of Watertown; and, if so, for how long?

A. They have; can't say just how long, but for three years certain.

Q. Did A. F. Smith & Co. keep an account with that bank before they came to Oswego?

A. They did; and they continued to keep an account with the Merchants' Bank after they came here.

Q. What was the business of A. F. Smith & Co. in 1868 and 1869?

A. They were dealers in grain.

Q. Did they have an elevator at Oswego?

50 A. They did; I suppose they did. They advertised to run an elevator—the Corn Exchange elevator.

Q. Were they also commission merchants for the sale of all kinds of grain?

A. I do not know whether they were or not, but they so advertised.

Q. Did your bank have correspondence with A. F. Smith & Co. during the time they kept their account with your bank?

A. It did.

Q. Did your bank receive letters from them during the time they kept an account there?

A. It did.

Q. Was there such a heading on those letters, such as is on the letter shown to you?

A. On most of them there was, but cannot say there was on all of them.

Q. State what that heading is.

A. Office of A. F. Smith & Co., Proprietors of the Corn Exchange Elevator, Commission Merchants for the sale of all kinds of State, Western, and Canada grain. That is all the heading.

Q. Have you any idea of the extent of their transactions in grain, as to the amount of business they did?

A. Their transactions before 1869 were not so large as they were during 1869. During 1869 they were very large, I should think.

Q. Was there any account with your bank that was larger than that of A. F. Smith & Co.?

A. I could not tell without looking at our books. We have some nearly as large, if not larger.

Q. How many had you nearly as large?

A. We had one or two, certain, that were nearly as large, if not quite.

Q. Do you recollect the date of the stoppage of A. F. Smith & Co.?

A. I think it was on or about the 15th of October, 1869.

Q. Did you know of any suspension or stoppage before the 15th of October, 1869?

A. No, sir.

Q. How was the credit of A. F. Smith & Co. down to the time of the stoppage?

A. It was considered good by us, and was good with our bank at that time.

Q. When did your bank first receive consignments by bills of lading from western banks with drafts on A. F. Smith & Co. for collection?

A. I think in the summer of 1868.

Q. Did they receive such consignments in 1868?

A. I think we did; that is my recollection.

Q. And did you receive such consignment by bills of lading with drafts on A. F. Smith & Co. during 1869, prior to those consignments to which you have testified?

A. I think we did; that is my best recollection.

Q. Before these consignments by bills of lading, concerning which you have testified on your direct examination, had your bank received consignments by bills of lading for account of the National Exchange Bank of Milwaukee or the Wisconsin Marine & Fire Insurance Company, with drafts enclosed on A. F. Smith & Co.; and if so, how many in 1868 and 1869?

A. I am unable to answer the question. I believe that we did; certainly with the National Exchange Bank of Milwaukee. After examining our letter-book, I can say that we did receive consignments from both of those banks prior to that time.

51 Q. In those cases were the drafts paid by A. F. Smith & Co.?
A. I think they were.

Q. You testified to receipt of certificates of insurance in the enclosure you received from Milwaukee; when did the period of those certificates of insurance expire?

A. I suppose they covered the cargoes until delivered from on board of the vessel at Oswego. They are expressed "On cargo of the schooner (naming it) at and from Milwaukee to Oswego." This is so of all the certificates of insurance in respect to all those cargoes.

Q. In either of those cases testified to by you on your direct examination, was your bank put in funds by either of the banks consigning the cargo to you, for the payment of freight or further insurance or other charges?

A. No, sir.

Q. Did you receive any instructions in either of these cases in regard to the payment of the charges of freight, or in respect to effecting further insurance?

A. No, sir.

Q. On the receipt of the papers, as testified by you as mentioned in Exhibit No. 5, did you enclose the drafts therein mentioned to A. F. Smith & Co., in the letter now shown to you, dated September 6th, 1869, of which Exhibit A, (A. B. G.) is a copy? (Hereto attached.)

A. I did.

The defendants' counsel here read copy letter Exhibit A, (A. B. G.) Moffitt, as follows:

Exhibit A, A. B. G.

NORRIS WINSLOW, *Banker.* J. F. MOFFITT, *Cashier.*

MERCHANTS' BANK,
Watertown, N. Y., September 6, 1869.

A. F. SMITH & Co.,
Oswego, N. Y.

DEAR SIR: Please find enclosed for acceptance and return the following, to wit:

W. P. McLaren & Co., on your st	.....	$4,080	81 and exg.
do " October 5	.....	7,500	00
do " " 20	.....	7,500	00

Also inspection certificate.

Yours, very respectfully,

J. F. MOFFITT, *Cashier.*

Q. Did you write that letter yourself?

A. I did.

Q. Was that letter written and sent on the day of the receipt of the letter Exhibit No. 5, with enclosures (B. L. schooner Kate Kelly?)

A. It was.

Q. On the same day was the order for the captain, Exhibit No. 2, transmitted to Oswego, or to whom and to whose care?

The following is a copy of said Exhibit No. 2:

NORRIS WINSLOW, *Banker.* J. F. MOFFITT, *Cashier.*

MERCHANTS' BANK,
Watertown, N. Y., September 6, 1869.

ROBERT HAYES, Esq.,
Master Schooner Kate Kelly, Oswego, N. Y.

DEAR SIR: Please deliver to the Corn Exchange elevator, Oswego, New York, your cargo 8,727 bushels of amber Milwaukee wheat, and 5,527$\frac{30}{60}$ bushels of No. 1 amber Milwaukee wheat, consigned to us by W. G. Fitch, esq., cashier.

Yours, respectfully,

J. F. MOFFITT.

52 A. I supposed it to be sent upon the same day, and addressed to the proprietors of the Corn Exchange elevator.

Q. In that form, or to A. F. Smith & Co, proprietors of the Corn Exchange elevator?

A. I cannot say positively.

Q. Who were the proprietors of the Corn-Exchange elevator?

A. A. F. Smith & Co. advertised to be.

Q. You understood them to be proprietors at the time that letter was directed to Oswego?

A. I understood them to be the persons conducting the business.

Q. Were A. F. Smith & Co., whom you understood to be the persons conducting the business, the same A. F. Smith & Co. upon whom the drafts remitted for acceptance were drawn?

A. I had no knowledge on the subject whether they were one and the same firm or not.

Q. Had you any knowledge at the time that they were different persons?

A. I had not.

Q. At the time of the transmission of the order for the captain, your recollection, as you have testified on the direct examination, is, that another letter was written, directed and sent to A. F. Smith & Co., or A. F. Smith & Co., proprietors of the Corn-Exchange elevator, or the exchange elevator. Is that correct as you have stated it?

A. It is.

Q. Is that you recollection now?

A. It is.

Q. You suppose this other letter was copied in the letter-book, on the leaf which is torn out?

A. I did.

Q. Did this other letter, and the order for the captain, and the letter of which Exhibit A is a copy, with the draft enclosed, constitute the whole transmission to Oswego of that date?

A. It did, with the drafts and inspector's certificate.

Q. What is that inspector's certificate?

A. The inspector appointed by the board of trade, at the place of shipment, certifies to the quality or kind of wheat, and this is his certificate. The form of it is substantially as follows:

"CHAMBER OF COMMERCE,
"*Milwaukee*, (the date.)

"I hereby certify, I have inspected the cargo this day put on the

bushels, No. wheat, according to the present standard adopted by the chamber of commerce of the city of Milwaukee.

"*Grain Inspector.*"

{ SEAL OF CHAMBER OF COMMERCE OF MILWAUKEE. }

Q. Were the above papers transmitted to Oswego by the Merchants Bank before the arrival, or before the vessel was due at Oswego?

A. I cannot say.

Q. Don't you know the usual time of passage by vessel from Milwaukee to Oswego?

A. I suppose it to be about two weeks.

Q. Well, then, were not those papers transmitted to Oswego before the arrival of the vessel could be expected, in due course, with advices before you, of shipment on board at Milwaukee, on the first of September, under bill of lading dated September 1st?

A. Yes, sir; when my previous answer was made, I had not in mind the date of the bill of lading.

Q. The next thing, in due course, would be the receipt of the drafts accepted from Oswego?

A. It would.

53 Q. How was the sight draft paid in this case?

A. I cannot tell how this was paid in this case; there are two ways in which they are paid; sometimes they accepted the sight drafts, returned them to the bank, and they were charged to the account. In other cases thay retained the sight drafts, and sent their check upon the Merchants' Bank for the payment of it.

Q. Would the next thing be, so far as the bank gave personal attention to the transaction, the presenting for payment, or the receipt of payment of the time draft?

A. It would.

Q. In what manner were these time-drafts presented for payment?

A. They were presented at the counter of the Merchants' Bank, where they were made payable.

Q. Was the course of business in reference to the other consignments to which you have testified on your direct, by the Grenada, by the Corsican, by the Thomas Parsons, and the Atmosphere, substantially the same?

A. Yes, sir.

Q. On receipt of this letter, Exhibit No. 6, (enclosures of Grenada,) at the date you have stated, with its enclosures and drafts, did you transmit the drafts mentioned in Exhibit No. 6, by letter, now shown you, dated September 16, 1869, of which Exhibit B, (A. B. G.,) hereto annexed is a copy?

A. I did.

The following is a copy of letter Exhibit B, (A. B. G.,) Moffitt.

Exhibit B, A. B. G. (Moffit.)

NORRIS WILSON, *Banker.* J. F. MOFFITT, *Cashier.*

MERCHANTS' BANK,
Watertown, N. Y., September 16th, 1869.

A. F SMITH & CO.,
Oswego, N. Y.

DEAR SIR: I enclose herewith, for acceptance and return, the following drafts, to wit:

W. P. McLaren & Co., on your st. ..... $1,232 24 and exg.
do. " Oct. 16 ..... 8,000 00
do. " " 31 ..... 8,000 00
Also inspector's certificate.
Yours, resp'y,

J. F. MOFFITT, *Cashier.*

Q. And was an order for the captain, for the delivery of the cargo of the Grenada, enclosed to Oswego, on the date of the letter on which Exhibit B, is a copy, with another letter of which you believe a copy was made in the letter-book on a leaf torn out?

A. It was.

Q. The next thing was the receipt of the draft accepted, was it?

A. Yes, sir.

Q. The sight draft was paid, and the two time drafts were presented by you at the Merchants' Bank for payment, and protested for non-payment?

A. They were.

Q. In the case of the Kate Kelly were any of the time drafts paid?

A. There was one which came due first. That draft matured October 5, 1869, and for $7,500.

Q. Is the letter dated October 1st, now shown you, of which Exhibit C, (A. B. G.,) hereto annexed is a copy, the letter in which drafts mentioned in letter Exhibit No. 7, Corsican, was transmitted to Oswego for acceptance and return?

A. It is.

54 *Exhibit C, A. B. G. (Moffitt.)*

NORRIS WINSLOW, *Banker.* J. F. MOFFITT, *Cashier*

MERCHANTS' BANK,
Watertown, N. Y., October 1, 1869.

A. F. SMITH & Co.,
Oswego, N. Y.

DEAR SIR: I enclose for acceptance and return the following drafts, to wit:

W. P. McLaren & Co. on you, sight ..... $3,422 93 and exg.
do. do. October 30 ..... 6,600 00
do. do. Nov. 14 ..... 6,600 00
Also inspector's certificate.
Yours, respectfully,

J. F. MOFFITT, *Cashier.*

Q. Was an order for the captain for delivering the cargo of the Corsican, and another letter of which you believe a copy was on a leaf torn out of a letter-book, transmitted on the date, October 1, to Oswego to the same parties or addressed as in the other case?

A. Yes,

Q. Was this sight draft in this case paid?

A. It was; the time drafts were presented for payment to the Merchants' Bank and protested for non-payment.

Q. Do you know that A. F. Smith & Co., the proprietors of the Corn Exchange elevator, were the same A. F. Smith & Co. upon whom the drafts were drawn?

A. I now believe that they were.

Q. Did you direct A. F. Smith & Co. to effect insurance upon those cargoes, after being unloaded from the vessels?

A. I did not.

Q. Did you call upon them for, or receive, warehouse receipts for any of those consignments?

A. I did not.

Q. Did your bank make any inquiry, to your knowledge, after any of those consignments, after they were unloaded, until after A. F. Smith & Co. stopped payment?

A. It did not.

Q. You received from W. G. Fitch, cashier of the National Exchange Bank, a letter of date Sept. 2d, of which you have testified, and which is marked Exhibit No. 5?

A. Yes, sir.

Q. Did you acknowledge the receipt of that letter of date Sept. 6th?

A. I did.

(Exhibit No. 11, Fitch, above herein, is a copy of the letter of acknowledgment.)

Q. After that letter of September 6th, 1869, was posted, did the Merchants' Bank receive a letter from W. G. Fitch, cashier, dated Milwaukee, Sept. 8th, 1869, now shown you?

(Letter press copy, Ex. No. 18, Fitch.)

A. Yes, sir.

Q. What was the date of the receipt?

A. On or about 11th September, 1869.

Q. Is copy Exhibit "No. 18, (F. B.,)" purporting to be a copy of a letter dated September 8, 1869, to the Merchants' Bank of Watertown, N. Y., by W. G. Fitch, cashier, annexed to deposition of William G. Fitch, in the suit of the National Exchange Bank of Milwaukee, against David Dows and others, U. S. circuit court for the southern district of New York, a correct copy?

A. It is; except that the original has a heading on it, as follows, in print:

"C. D. NASH, *President.* W. G. FITCH, *Cashier.*"

"THE NATIONAL EXCHANGE BANK OF MILWAUKEE.

"U. S. DESIGNATED DEPOSITORY, MILWAUKEE, WIS."

before the date of the letter, which is not in the letter marked Exhibit No. 18, (F. B.,) in said deposition of W. G. Fitch, and after the words "To Merchants' Bank of Watertown, N. Y.," the words "Dear Sir."

55 Q. Do you recollect of writing a reply to the letter of Mr. Fitch, of September 2d, 1869, as cashier of the Merchants' Bank of Watertown?

A. I think I did.

Q. Do you recollect about the date of it?

A. I do not; it must have been in a few days from the receipt of it.

Q. After reading "Exhibit No. 20, F. B.," (Ex. No. 20, Fitch, above,) annexed to deposition of William G. Fitch, cashier, state whether you have any recollection of writing a letter of which that purports to be a copy?

A. I have no recollection of the contents of the letter.

Q. Look in your letter-book, and see if you have a copy of that letter of September 13th, marked Exhibit "No. 19, F. B.," (Ex. No. 19, Fitch, above,) in the said deposition of William G. Fitch, which purports to have been written by you?

A. I have not such copy.

Q. You have no doubt such letters were written and sent about those dates?

A. I don't know as to that.

Q. In the cases of consignments, by bill of lading, for account the National Exchange Bank or the Wisconsin Marine Fire Insurance Company, to the care of your bank, before these consignments, which you have testified to on your direct examination, did your bank make inquiry, after the grain had been unloaded into the warehouse, for the grain?

A. Not to my knowledge.

By Mr. Van Santvoord:

Q. Were the copies of the orders for the captains, to which you have testified as made by you, made with the original orders before you?

A. They were not.

Q. Did you make the copies from any, and what, paper or papers?

A. I made them from the press-copy in the letter-book, all except the printed heading; I mean the letter-book of the Merchants' Bank.

Q. Were they so taken before the leaves were removed from the book?

A. I cannot say positively, but I think they were not.

The plaintiff's counsel further read from the deposition of this witness as follows, in redirect:

Q. Did the counsel for the defendants produce to you your original letter of which Exhibit F purports to be a copy?

A. He did.

Q. Do you know when or from whom he obtained that letter?

A. I do not.

Q. Had you seen that letter from the day it was mailed to A. F. Smith & Co., or the proprietors of the Corn Exchange Elevator, until it was produced here on this examination?

A. I had not.

Q. Who did the correspondence generally of the Merchants' Bank?

A. One of the clerks did the correspondence of enclosures of checks; the important correspondence I did myself. I signed all the letters, I think, at that time.

Q. Had you the general control of the business of the bank?

A. No, sir; I had not.

Q. What were your duties as cashier of the bank?

A. My business was to see that the business was conducted accurately, and have oversight of the clerks and correspondence.

56 Q. By whom were you employed as cashier of that bank, to attend to the duties you have described?

A. Employed by Norris Winslow. He was the proprietor of the bank.

The plaintiff's counsel here read in evidence from the deposition of Morgan M. Wheeler, taken before U. S. Commissioner Getty, at Oswego, under notice to the defendants, on the 24th April, 1870, as follows:

MORGAN M. WHEELER, having been duly sworn and cautioned as aforesaid, did depose and say:

My age is thirty-four years. I reside in Oswego City, and over three hundred miles from New York. I know the schooner Grenada, and am the owner of her. In September last she was loaded with wheat in Milwaukee, for this port. I know of her arrival at this port the 22d or 23rd of September, 1869. As owner I have the manage-

ment of her; after her arrival here her cargo was delivered to the Corn Exchange Elevator. The captain gave me no memoranda of her cargo except the bill of lading, which I have here, and signed by the shipper.

(The bill of lading thereto attached, marked Exhibit No. 3, A. B. G, Wheeler, was here read in evidence.)

I had an order for the delivery of that wheat, but have not got it here. The order was from the Merchants' Bank, at Watertown, and directed to the captain, A. D. McIntyre. I received but one order for that cargo. The order came to the care of A. F. Smith & Co., or the Corn Exchange Elevator. The order was not in an envelope. I saw the order in A. F. Smith's & Co's', or the Corn Exchange Office. I am not positive whether I took the order from the office or got it of the captain. I afterwards saw the order on board of the vessel, among the captain's papers. I saw the order before the vessel arrived here, but do not know how it was sent here. My impression is, I had the order at my office, and that it came there with the rest of the vessel's papers. At the end of every trip we settle up with the captain, and he brings in the vessel's papers. I do not know where that order is now. I have searched for it among my papers in my office, and also on the vessel. I have searched a great many times, thoroughly, and have not been able to find it. The cargo was delivered in pursuance of the terms of that order. She got in in the night some time, and commenced unloading the next morning about 8 o'clock, and she was unloaded by 12 or 1 o'clock of that day.

(Witness here shown receipt endorsed on Exhibit No. 3, and he says:)

I took the receipt endorsed on "Exhibit No. 3." I am not able to state in whose handwriting the receipt is, but, in my opinion, it is in the handwriting of John H. Forsyth, one of the clerks in the Corn Exchange Elevator. I saw the order at the Corn Exchange Elevator before the vessel arrived, and either Mr. Smith or Mr. Bickford, or both, were there at this time. I understood that Ananias F. Smith and Sidney Bickford were partners in business.

Cross-examination, (read by defendants' counsel:)

The tonnage of my vessel is, when full, 15,000 bushels of wheat, and will carry 14,500 bushels through the Welland Canal. There was only this one lot of wheat on board of her, mentioned in "Exhibit 3." The only bill of lading I ever knew anything about is "Exhibit No. 3." The freight receipted on the back of the bill I received, and I think it was paid to me by Mr. Forsyth. This receipt is the only voucher I
57 have for the delivery of the cargo. The order I received is substantially like the order marked "Exhibit No. 2," (Kate Kelly.) I was acquainted with A. F. Smith & Co. I have brought cargoes with the Grenada for A. F. Smith & Co.; they run the Corn Exchange elevator. Their business was general commission business, and bought and sold wheat. They carried on their general business over the river, at the Corn Exchange elevator. I think the sign over the door is A. F. Smith & Co. I think, also, the Corn Exchange is on the door. I don't know how long that order had been at A. F. Smith & Co.'s before I saw it. The usual length of voyage from Milwaukee to this port is from ten to sixteen days. The Grenada was chartered to receive the wheat at Milwaukee.

(The defendants' counsel offered to read the following two questions, and the answers thereto, as bearing upon the question and manner in which the Merchants' Bank of Watertown directed the wheat to be put in the elevator of A. F. Smith & Co., and as showing the course of business.)

Q. Have you had cargoes of grain come from Milwaukee through the same parties as mentioned in this bill of lading, "Exhibit No. 3?"

A. It is my impression we have, I should say, quite a number of times.

Q. In all those cases have you made deliveries to A. F. Smith & Co., at the Corn Exchange elevator, in the same way that the cargo of the Granada was delivered?

A. In most cases we have. There have been cases where we have been ordered to deliver to the other elevators by these parties. In two cases the order came from A. F. Smith & Co. to deliver to other elevators; in the other cases, don't remember who gave the orders.

(The plaintiff's counsel objected as calling for testimony which is irrelevant and incompetent, and because it relates to other and different transactions between persons or parties not parties to this suit, and because no evidence has been given, or is proposed to be given, that the plaintiff in this suit had any knowledge that said other cargoes had been so delivered. The judge excluded them until some evidence was given tending to show that the plaintiff was aware of the fact inquired of. The defendants' counsel excepted to the judge's ruling.)

On being re-examined by plaintiff's counsel, said witness further testified:

I don't know as I can give the exact terms of the order I received. I could give pretty near the words of the order. I hold in my hand a paper purporting to be a copy of the order given to my captain for the delivery of the cargo of wheat brought by the Grenada.

Q. State whether that is a correct copy of the order you mentioned you received in September last for the discharge of the cargo of the Grenada, the original of which you are unable to find.

(Objected to by defendants' counsel, that witness should not testify from that copy unless the witness made the copy from the original order, or compared it with the original order before it was lost.)

Witness answers: In my opinion this is substantially in the same words as the original order.

(The said copy offered in evidence, and marked "Exhibit No. 4," and thereto attached.)

58 On the river-front of the elevator, where A. F. Smith & Co. do business, there is a sign marked "Corn Exchange Elevator," painted in large letters on the building. I was not present when the charter of the Grenada was made, and have no knowledge of it except as I have been informed of it.

Question by plaintiff's counsel. Did A. F. Smith & Co. receive grain and produce simply for storage and transshipment in the Corn Exchange elevator?

Witness answers: To the best of my knowledge they received them both.

M. M. WHEELER.

Subscribed and sworn to before me this 28th day of April, 1870.

ALFRED B. GETTY,
U. S. Commissioner.

Exhibit No. 3.—A. B. G. (Wheeler.)

No.——.

MILWAUKEE, *September* 11, 1869.

Shipped in good order and condition, by W'm P. McLaren & Co., as agents and forwarders, for account and at the risk of whom it may concern, on board the schooner Grenada, whereof A. D. McIntyre is master, bound from this port for Oswego, the following articles as here marked and described, to be delivered in like good order and condition as addressed on the margin, or to his or their assigns or consignees, upon paying the freight and charges as noted below, (dangers of navigation, fire, and collision excepted.)

And it is agreed between the carriers and shippers and assigns, that in consideration especially of the rate of freight hereon named, the said carriers, having supervised the weighing of said cargo on board, hereby agree that this bill of lading shall be conclusive between shippers and assigns and carriers, as to the quantity of cargo to be delivered to consignees at the port of destination, (except when grain is heated or heats in transit,) and that they will deliver the full quantity hereon named, or pay for any part of cargo not delivered at the current market-price, the value thereof to be deducted from the freight-money by consignees, if they shall so elect, and thereupon the carrier shall be subrogated to the shippers and owners' rights of property and action therefor.

And said shippers or owners hereby assign their claim and right of action, for such deficiency or deficiencies, to the carrier.

In witness whereof the said master of said vessel hath affirmed to three bills of lading, of this tenor and date, one of which being accomplished, the other to stand void.

Fourteen thousand five hundred (14,500) bushels No. 1 amber Milwaukee wheat.

Freight payable by consignees at the rate of twelve (12) cents per bushel of 60 pounds.

W. P. McLAREN & CO.,
Shippers.

Ac. W. G. Fitch, cashier, care Merchants' Bank, Watertown, N. Y.

On the back is endorsed as follows:

Received 14,500 bushels, freight,		12	.....	$1,740 00
$2\frac{9}{60}$	" over	$1 40	.....	3 03
				$1,743 03
Less elevating.....			$36 25	
" shoveling.....			58 00	
				$94 25
				$1,648 78

A. F. SMITH & Co.
F.

59 *Exhibit No. 4, A. B. G. (Wheeler.)*

NORRIS WINSLOW, *Banker.* J. F. MOFFITT, *Cashier.*

MERCHANTS' BANK,
Watertown, N. Y. September 16, 1869.

A. D. MCINTYRE, Esq.,
Master schooner Grenada, Oswego, N. Y.

DEAR SIR. You may deliver your cargo of 14,500 bush. No. 1 amber Mil. wheat, to the Corn Exchange elevator, of Oswego, N. Y., for account of W. G. Fitch, cashier, and subject to order of this bank.

Yours, respectfully,

J. F. MOFFITT.

The plaintiff's counsel next read in evidence from deposition of Archibald D. McIntyre, taken before U. S. Commissioner Getty, at Oswego, 23d of May, 1870.

ARCHIBALD D. MCINTYRE, having been duly sworn as aforesaid, testified as follows:

I reside in the city of Oswego, and more than one hundred miles from the city of New York. My age is thirty-four years. I was in Sept. 1869, master of the schooner Grenada. The Grenada took on a cargo of wheat at Milwaukee, on or about September 11, 1869, and was taken on board from Angus Smith & Co.'s elevator.

Q. Look upon the bill of lading now shown you, dated September 11, 1869, marked Exhibit No. 3, (F. B.,) (No. 3 Fitch, a copy,) and state whether you signed said bill of lading?

A. I did. The signature, A. D. McIntyre, master, is my signature.

Q. Did the Grenada reach Oswego with that cargo of wheat?

A. Yes, sir.

Q. At what elevator in Oswego was the cargo of the Grenada delivered?

A. The Corn Exchange elevator.

Q. Did you have any order from the Merchants' Bank, at Watertown, for the delivery of that cargo?

A. I did.

Q. Have you that order in your possession?

A. No, sir; and I do not know where it is; and the last I knew of it, or saw it, was aboard the vessel. I left the papers in the care of Captain Wheeler—Morgan M. Wheeler, the owner of the vessel. I had the order in my possession before I delivered the cargo. I received the order from Captain Wheeler.

Cross-examination, (read by defendants' counsel:)

Q. At the time you signed the bill of lading marked Exhibit No. 3, (F. B.,) (No. 3 Fitch,) was the endorsement on the back thereof?

A. No, sir; I think not.

Q. Do you recollect who were the shippers of that wheat at Milwaukee?

A. I think it was Mr. McLaren, but I would not be positive.

Q. Did you ever see the bill of lading marked Exhibit No. 3, (A. B. G.,) attached to the deposition of Morgan M. Wheeler?

A. I think I have; and I received it at Milwaukee, from Mr. McLaren's book-keeper.

Q. Then, after your arrival at Oswego, did you take the cargo to the Corn Exchange elevator?

A. I did; Captain Wheeler attended to the discharging of the vessel, and settled for the freights.

ARCHIBALD D. McINTYRE.

60 Taken, subscribed, and sworn to before me this 23d day of May, 1870.

ALFRED B. GETTY,
United States Commissioner.

The plaintiff's counsel next read in evidence from the deposition of William A. McCarthy, taken before U. S. Commissioner Getty, at Oswego, May 14, 1870.

WILLIAM A. MCCARTHY, having been duly sworn as aforesaid, did thereupon depose and say as follows, to wit:

I reside in Oswego, and more than one hundred miles from New York City. My occupation is sailor. My age is thirty-four years. My occupation in the months of September and October, 1869, was master of the schooner Corsican.

Q. Was the schooner Corsican, of which you were master, in Milwaukee on or about the 25th day of September, 1869?

A. She was.

Q. Did the said schooner take on board at Milwaukee, at or about said date, a cargo of wheat?

A. She did.

Q. Will you look at the bill of lading now shown you, dated Sept. 25, 1869, and marked Exhibit No. 14, (F. B.,) (Ex. 14, Fitch,) and state whether or not you signed said bill of lading at or about said date?

A. I did; the signature is mine. There was no endorsement on the back when I signed the bill of lading.

Q. State whether or not the said wheat was on board the said vessel before you signed the said bill of lading?

A. It was all on board. It was weighed, and very little in the hopper. I don't think over a couple of thousand bushels were in the hopper. It was dark, and the trimmers could not do justice by it, so we left it till next morning.

Q. Did the quantity of wheat mentioned in the said bill of lading actually go into said schooner Corsican at or about said date, and before said schooner left the port of Milwaukee?

A. It did; the balance went in on the morning of the 26th Sept., 1869.

Q. Did you have with you, at the time of signing the bill of lading, the orders of the warehouseman for the amount remaining in the hopper?

A. I had the warehouse receipts for the whole cargo, and delivered them to W. P. McLaren & Co. at the time, and signed the bill of lading.

Q. When, or about when, did the Corsican with said wheat on board sail from Milwaukee?

A. The afternoon of the 26th of September, 1869.

Q. Destined to what port?

A. Oswego.

Q. Did the said vessel Corsican arrive at Oswego, and when, or about when, with the said cargo of wheat?

A. She arrived at Oswego Oct. 7th, 1869.

Q. Into what warehouse in Oswego was the cargo of the Corsican delivered, and when?

A. The Corn Exchange elevator, October 8th, 1869.

Q. Had you any order for the delivery of the said cargo into the said elevator; and, if yea, have you the said order with you?

A. On the morning of the 1st of October, 1869, I had an order in my hands, handed to me that morning in the office of A. F. Smith & Co., at Oswego, by the book-keeper as I suppose, Mr. Forsyth I understood was his name. I have not the order with me.

Q. Do you know where the order is?

A. I do not.

61 Q. Have you looked for said order?

A. I have looked among my receipts and papers, and could not find it; I mean, the papers and receipts of the vessel.

Q. When and where was the said order the last time you have any recollection of seeing it?

A. It was in my hands. I don't recollect whether I handed it back to Mr. Forsyth, or laid it down on the counter; I don't recollect what I did do with it.

Q. Did you read the said order?

A. I did.

Q. By whom did the said order purport to be signed?

A. If I recollect right, it purported to be signed by Moffit, or some such name as that.

Q. Was the order, as you recollect it, written under a printed heading, similar to the one now shown you, marked Exhibit No. 8, A. B. G., attached to the deposition of J. F. Moffit?

A. To the best of my knowledge, it was.

Q. State whether or not said order, as you recollect it, was similar in its terms to the said exhibit?

A. I think it was, to the best of my knowledge now.

Q. Have you with you a bill of lading signed W. P. McLaren & Co., shippers, with a receipt endorsed on the back thereof?

A. I have.

Q. Will you produce it?

A. I will, and here produce it.

Q. Is the paper now shown you and marked Exhibit W. A. McC., No. 3, (A. B. G.,) a copy of said bill of lading produced by you and hereto annexed, and the receipt endorsed on the back thereof?

A. It is.

Q. In whose handwriting is the said endorsement on the back of said bill of lading produced by you?

A. I think it is Mr. Forsyth's. I know Mr. Bickford was in the office of A. F. Smith & Co. at the time we settled the freight and talked about the shortage, and can't swear positively that Bickford was present when the receipt was written on the back of the bill of lading, but think he was.

Q. Did you deliver the same wheat into said Corn Exchange Elevator from said schooner Corsican, which you took on board said schooner at Milwaukee?

A. I did.

Q. Did you have more than one order from the Merchants' Bank for the delivery of the said cargo?

A. No, sir.

Cross-examination read by defendants' counsel:

Q. Who were the owners of the Corsican in September and October, 1869?

A. A. F. Smith, of the firm of Smith & Post, John K. Post, and W. A. McCarthy.

Q. Is the bill of lading of which a copy is marked W. A. McC., No. 3, what is called the captain's bill of lading?

A. Yes, sir.

Q. From whom did you receive that document?

A. I won't be positive whether it was Mr. McLaren or his head book-keeper. Mr. McLaren was there when I got the bill of lading.

Q. Is the certificate or receipt endorsed thereon the captain's voucher for the delivery of the cargo?

A. I should think it was.

Q. Is such receipt on the captain's bill of lading kept by him and filed with the papers of the vessel according to the ordinary course of business?

A. It is.

62 Q. By whom was the Corsican chartered to receive that wheat at Milwaukee, and for whom?

Ans. Chartered by R. P. Fitzgerald & Co. for McLaren & Co., to take that load of wheat.

(The plaintiff's counsel objected to the reading of the following question and answer, because irrelevant and incompetent and the declarations of a third party in the absence of the parties to this suit, and contradicts, or tends to contradict, the bill of lading transferred to the plaintiff, and upon the faith of which plaintiff made the discount.)

Q. Were you informed, or did you understand from McLaren & Co., to whom that wheat was to go at Oswego?

A. I did from McLaren himself; he told me to A. F. Smith & Co.'s Corn Exchange Elevator. It was not in the bill of lading. This was the conversation.

(The judge sustained the objection, and counsel for defendants excepted.)

Q. Did you enter the vessel at the custom-house on its arrival at Oswego?

A. Yes, sir.

(The plaintiff's counsel objected to the reading of each of the following questions and answers, because irrelevant and incompetent, and the act of a third party in the absence and without the knowledge of the plaintiff in this suit; and further, that the manifest is the best evidence.)

Q. And for whom was the wheat entered at the custom-house at Oswego?

A. I won't be positive, but I think for A. F. Smith & Co.

Q. Was the wheat entered on the manifest as for A. F. Smith & Co.?

A. I can't swear positively, but I think it was.

(The court sustained the objections, and defendants' counsel excepted.)

(The plaintiff read re-examination.)

Q. Under what order did you deliver the cargo to the Corn Exchange Elevator?

A. Under the order from the Merchants' Bank.

Q. What do the items on the face of the bill of lading of which Exhibit W. A. McC., No. 3, (A. B. G.,) is a copy, worded "Elevating, $33.39; shoveling, $53.43," mean?

A. They mean I had paid the elevating and shoveling.

W. A. McCARTHY.

Taken, subscribed, and sworn to before me this 14th day of May, 1870.

A. B. GETTY,
U. S. Commissioner.

63 Copy of exhibits attached to depositions of W. A. McCarthy.

Exhibit W. A. McC., No. 3, A. B. G.

No. MILWAUKEE, *Sept. 25th*, 1869.

Shipped in good order and condition, by W'm P. McLaren & Co., as agents and forwarders, for account and at the risk of whom it may concern, on board the schooner Corsican, whereof W. A. McCarthy is master, bound from this port to Oswego, the following articles as here marked and described, to be delivered in like good order and condition as addressed on the margin, or to his or their assigns, consignees, upon paying the freight and charges as noted below, (danger of navigation, fire, and collision excepted.)

And it is agreed between the carriers and shippers and assigns, that in consideration especially of the rate of freight herein named, the said carriers having supervised the weighing of said cargo inboard, hereby agree that this bill of lading shall be conclusive as between shipper' and assigns and carriers, as to the quantity of cargo to be delivered to consignees at the port of destination, (except when grain is heated or heats in transit,) and that they deliver the full quantity herein named, or pay for any part of cargo not delivered at the current market-price, the value thereof to be deducted from the freight-money by consignees, if they shall so elect, and thereupon the carrier shall be subrogated to the shippers and owners' right of property and action therefor.

And said shippers or owners hereby assign their claim and right of action, for such deficiency or deficiencies, to the carrier.

In witness whereof the said master of said vessel hath affirmed to three bills of lading, of this tenor and date, one of which being accomplished, the other to stand void.

Account W. G. Fitch, cash.

Thirteen thousand four hundred (13,400) bushels No. 1 amber Milwaukee wheat. Care Merchants' Bank, Watertown, N. Y. Freight payable by consignees at the rate of twelve (12) cents per bushel of 60 lbs.

W. P. McLAREN & CO.,
Shippers.

On the back is endorsed as follows:

Rec'd 13,400 fr't, 12 c			1,608
Less " 41.55 bus. sht			13,556 59
" Elevating	33 99		
" Shoveling	53 43		
		143 41	
P'd capt		1,464 59	
			1,608 00

A. F. SMITH & CO.

The plaintiff's counsel next read from the deposition of Sidney Bickford, taken at Oswego, before United States Commissioner Getty, on May 3, 1870, and other days.

SIDNEY BICKFORD: I reside in Oswego, New York, more than one hundred miles from the city of New York, and my age is thirty-six years. I have resided in Oswego about two years. I am one of the firm of A. F. Smith & Co., Oswego, and with A. F. Smith compose the entire firm.

Q. Were they, in the months of September and October, 1869, the proprietors of the warehouse situated in the city of Oswego known as the Corn Exchange Elevator?

64 A. They were.

Q. Who, at that time, were the owners of the lot and the building?

A. Mr. De Wolf, Mr. Winslow, and Mr. Smith, I supposed to be the owners.

Q. Did the firm of A. F. Smith & Co. lease the warehouse from those parties?

A. Yes, sir.

Q. Where is that warehouse located in the city of Oswego?

A. In the Second ward, between East First street and the Oswego River, right on the river and north of Cayuga street.

Q. What is the size of that warehouse?

A. I don't know its size.

Q. What is its capacity for storage?

A. About 250,000 bushels.

Q. How is it arranged inside for the reception of grain?

A. It is provided with bins.

Q. How many bins are there in the warehouse?

A. I think there are fifty-one.

Q. What quantity of grain can be stored in each bin?

A. They are about the same size, except three; and have no personal knowledge what each bin will hold, having never weighed any into the bins.

Q. Is each bin numbered?

A. Each bin is numbered, except three on the rear of the building; three are not numbered, intended for delivery of grain to teams.

Q. In what manner are the bins numbered?

A. They are numbered by figures on the spouts leading from the bins, and presume they are numbered above also, but never noticed them.

Q. Are these bins all on the same floor?

A. The bins are on the same level.

Q. How, or by what process, is the grain removed from the vessel into the warehouse?

A. The vessel is hauled up alongside of the dock; the leg of the elevator is introduced into the hold of the vessel; this leg is so constructed that it swings out from the elevator and is lowered into the vessel, and the grain is taken up in sheet-iron buckets attached to a belt, running inside the elevator-leg, and is deposited in a receiving-bin at the top of the building; from that bin it is thrown into the weigh-hopper and weighed, which is lower than the receiving-bin; that weighing-hopper weighs usually 60 bushels at a time; the grain then goes either to other bins for storage, or for trans'hipment into canal-boats; after having been stored in the bins, the grain is thrown from the bins on to a conveyor, a wide belt, and is discharged at the foot of the lofters, and is

then elevated to the receiving-bin at the top of the building, from which it is thrown into the weigh-hopper and weighed, and discharged into the spout running into the canal-boat or vessel.

Q. Describe what you mean by the term "lofters."

A. It is a belt provided with buckets, which elevates the grain from the bottom to the top of the elevator.

Q. When a vessel is discharging a cargo at the warehouse, how many men are employed in the business at the elevator?

A. Three, usually.

Q. What are their duties?

A. The foreman has the general supervision of the work, one runs the machinery, and one to weigh. I mean by machinery, the machinery for elevating the grain into the warehouse as I have described.

Q. Who was the foreman in September and October, 1869?

65 A. Patrick McCanna.

Q. Who was the weigher?

A. I think we had at that time Charles Bough and Robert Burgess.

Q. Who run the machinery?

A. I think we had two machinery-men, George Minor and H. Maxon. George Minor was there all the time, and Maxon part of the time; Maxon was there, I should think, the whole of the month of September, and until about the 20th of October; I suppose he is in Oswego now; Minor is here now.

Q. Which of the weighers was there all the time during the months of September and October, 1869?

A. Burgess was there, I know, during the whole time; Robert Burgess and Charles Bough, I think, left some time in October; they are both in Oswego now.

Q. Was a tally-book kept at the elevator?

A. There were tally-books used there, and not kept there except when in use.

Q. For what purpose were those tally-books used in the elevator?

A. For recording the weight of the grain as it was received or discharged from the elevator.

Q. Did that tally-book contain the names of the vessels from which the grain was taken and carried into the elevator?

A. Yes, sir.

Q. What other book or books were used in the elevator, in connection with the receiving or discharging of grain?

A. None.

Q. Who kept the tally-book?

A. The weighman recorded the tallies into the tally-book as the grain was weighed.

Q. Did he report to any person connected with the elevator, and who, and in what way did he report, the amount of grain received into the elevator?

A. He reported by bringing the tally-book to the office, either he or the foreman.

Q. Into whose charge did he or the foreman deliver the tally-book?

A. He laid the book upon the desk in the office; don't know as he reported in any other way; it was not left at the book-keeper's desk particularly, but on a desk occupied by all of us.

Q. How many book-keepers did A. F. Smith & Co. keep in September and October, 1869?

A. One, and his name was John H. Forsyth.

Q. Were any entries made on any book from the tally-book; and, if so, on to what book, and by whom made?

A. The entries of receipts and deliveries of grain were entered in a book, the grain-book, by Mr. Forsyth, and taken by Mr. Forsyth from the tally-book.

Q. What were your particular duties as member of the firm of A. F. Smith & Co.?

A. I conducted the commission correspondence usually, and had a general oversight of the office-business.

Q. Did you keep the run of the receipt and delivery of grain?

A. I had a pretty fair knowledge of it at the time.

Q. Does the tally-book now before you contain the tallies of the cargoes of the lake vessels, or schooners, Corsican, Grenada, and Kate Kelly, which arrived in Oswego in the months of September and October, 1869, upon the discharge of the cargoes of wheat from those vessels into and from the Corn Exchange Elevator, at Oswego?

A. The books contain what purports to be the tallies.

66 Q. Have you any doubt that they do contain the tally-entries of the cargoes of those vessels?

A. I have not.

Q. Does the grain-book contain the entries of the grain received from the said schooners Corsican, Grenada, and Kate Kelly, in the months of September and October, 1869, upon the discharge of those vessels into the Corn Exchange Elevator, at Oswego, and also the delivery or shipment of the same grain from the elevator?

A. It contains what purports to be those entries.

Q. Does the shipping-book contain the bills of lading of all the cargoes of the said vessels, mentioned in the preceding interrogatory, which was shipped in canal-boats from the said Corn Exchange Elevator?

A. I think it does not.

Q. Does it contain the bills of lading of all the canal-boats which received the cargoes, or portions thereof, of the several schooners, Corsican, Grenada, and Kate Kelly, which were sent or consigned to the defendants, David Dows & Co.?

A. I think it purports to contain the bills of lading of all the canal-boats.

Q. Will you produce copies of the entries in the tally-books, and in the grain-book, and in the shipping-book, in relation to the receipt, delivery, or shipment of the cargoes, or any portion of the cargoes, of the said schooners Corsican, Grenada, and Kate Kelly, which arrived in September or October, 1869?

A. I will.

The counsel for plaintiff read in evidence copy-tally of receipt ex Kate Kelly, Exhibit No. 27, A. B. G., attached to Bickford's deposition; Exhibit No. 28, A. B. G., copy-tally of receipt ex Grenada; Exhibit No. 32, copy-tally of receipt ex Corsican,; also Exhibit No. 35 copy entries from delivery tally-book ex Kate Kelly.

Before the reading of Exhibit No. 27, the defendant's counsel objected to the reading of so much thereof as related to the first 7,300 bushels therein named, on the ground that it did not relate to the wheat now in question, and did not tend to identify the wheat in question. The plaintiff insisted upon the entire exhibit, as tending to identify the shipment in question made at Milwaukee, and to account for all the wheat that went by the Kate Kelly, & show what became of it, and so iden-

tify the plaintiff's property; and plaintiff's counsel proposes and offers by other evidence to trace the wheat into the hands of the defendants.

It not being suggested that the original entries should be produced, nor objected that the papers produced are copies, the court received the evidence.

Defendant's counsel excepted.

Plaintiff's counsel also read in evidence delivery-tally ex Grenada, Exhibit No. 36; also Exhibit No. 40, delivery-tally ex Corsican; also Ex. No. 32, A. B. G., further tallies of deliveries from Corsican; also Ex. 41 A; also Ex. Nos. 42 and 43, purporting to be entries of receipts; also entries of receipts and deliveries in grain-book, Exhibits
67 Nos. 42, 43, 44, and 45—so much as relates to the Kate Kelly, Grenada, and Corsican.

The plaintiff's counsel further read from deposition of Bickford as follows:

Exhibit No. 47 is a copy of the bill of lading of canal-boat Four Sisters, dated Sept. 18, 1869. Exhibit No. 48 is a copy of the bill of lading of canal-boat B. Hegeman, dated Sept. 27, 1869. Exhibit No. 54 is a copy of the bill of lading of canal-boat Anna Rebecca, dated Oct. 8, 1869. Exhibit No. 55 is a copy of the bill of lading of canal-boat George Ames, dated Oct. 8, 1869.

Q. Were those bills of lading in the book retained at the office of A. F. Smith & Co. as vouchers for the delivery to the canal-boats mentioned in them?

A. They were.

The plaintiff's counsel offer in evidence Exhibits 47, 48, 54, and 55, being copy-bills of lading from the shipping book of A. F. Smith & Co., on boats Four Sisters, B. Hegeman, Anna Rebecca, and George Ames, with the memoranda on them indicating the wheat as ex lake vessels designated.

Defendants' counsel objected to the reading of these bills with memoranda, as evidence of identity of wheat shipped on canal-boats with wheat received by lake vessels.

The court held that these bills of lading and memoranda were competent evidence as memoranda of the transaction, and as forming part of the res gestæ in connection with the other accounts which they corroborate.

Exhibits 47, 48, 54, and 55 were then read in evidence by the plaintiff, as attached to his deposition.

By Mr. Finch:

Q. Look at the Exhibits No. 42 (A. B. G.) and No. 44, (A. B. G.,) and state what, under the printed heading "date," the letters and figures thereunder mean.

A. I understand those are the dates of the receipt of the grain into the elevator.

Q. What do the words under the printed heading, "name of vessel," mean in the said Exhibits No. 42 and 44?

A. In those instances, the name of the lake vessel from which the grain was received into the warehouse known as the Corn Exchange Elevator.

Q. What do the initials or words under the printed heading "whose account" mean in said Exhibit Nos. 42 and 44?

A. Name of the party for whose account the grain was received into the warehouse. The initials A. F. S. & Co. mean A. F. Smith & Co.

Q. What do the figures in said Exhibits Nos. 42 and 44, under the printed heading, "bushels, lbs.," mean?

A. The amount of grain received from the vessels into the ware house.

Q. What do the words written under the printed heading "kinds of grain" mean in said Exhibits Nos. 42 and 44?

A. The description of grain received from the vessel into the warehouse.

Q. What do the figures under the printed heading "No. bins," in said Exhibits Nos. 42 and 44, mean?

A. The number of the bin into which the grain was deposited in the warehouse.

Q. What do the words and figures under the printed heading "date," in Exhibits Nos. 43 and 45, mean?

A. Date of the delivery of the grain from the elevator, received from the lake vessels named in Exhibits Nos. 42 and 44?

68 Q. What do the words written under the printed heading "how delivered," in Exhibits Nos. 43 and 45, mean?

A. It means the names, the canal-boats, persons or parties, to whom the wheat was delivered.

Q. What do the initials under the printed heading "whose account," in said Exhibits Nos. 43 and 45, mean?

A. The name of the party for whose account and upon whose order the grain was delivered.

Q. What do the figures under the printed heading "stored," in said Exhibits Nos. 43 and 45, mean?

A. The quantity of grain delivered from bins, and shows that grain went into bins before spouted into boats.

Q. What do the figures under the printed heading "amount of charges," in said Exhibits Nos. 43 and 45, mean?

A. The amount of storage on the several cargoes.

Q. Do the Exhibits Nos. 44 and 45 represent copies of the grain-book, relating to the receipt and delivery of the cargoes of the schooner Corsican?

A. Yes, excepting that in the original grain-book no more than two of these vessels are recorded on the same folio.

Q. Do Exhibits Nos. 42 and 43 represent, and are they copies of, the entries in the grain-book relating to the receipt and delivery of the cargoes of the schooners Kate Kelly, Grenada, and Gerrit Smith?

A. Yes, sir.

Q. Have you compared each and all of the exhibits produced by you, and which are annexed to this deposition, with the originals, respectively, and are they true and exact copies of said originals, which you have produced on this examination and testified to?

A. Yes, I have; and believe them to be true and exact copies.

Q. Were any persons interested in the business connected with the warehouse known as the Corn Exchange Elevator, in the city of Oswego, except yourself and A. F. Smith, in the months of September and October, 1869?

A. No, sir; none but our firm.

Q. Was Norris Winslow in any way interested in that elevator, aside from his being an owner in the land and the building thereon?

A. He was not.

Q. Did Norris Winslow, or the Merchants' Bank, have any interest in, or derive any profit from, the business of the Corn Exchange Elevator, or in the business which was carried on in that elevator by A. F. Smith & Co.?

A. No further than he might receive a profit from our transactions with and through the Merchants' Bank.

Q. Explain what you mean by "our transactions with and through the Merchants' Bank."

A. Our transactions through the Merchants' Bank were the same as through other banks. That is the whole extent of the connection with the business of the Corn Exchange Elevator.

Q. Did the firm of A. F. Smith & Co. receive grain into the Corn Exchange Elevator simply for storage?

A. Yes, sir.

Q. Was the elevator used also simply for the trans'hiping of grain?

A. It was.

Q. Was the Corn Exchange Elevator known as a public warehouse for the receipt of grain, for storage or trans'hipment?

A. It was known as a warehouse for that purpose; yes, sir.

69 Q. What proportion, or about what proportion, of the whole grain which was received into the warehouse, or shipped therefrom, during the years 1868 and 1869, until November, 1869, went into the elevator, either for storage or trans'hipment?

A. All that went through the elevator went into it for storage or trans'hipment.

Q. About how much grain of all kinds, in 1868 and 1869, and until November, 1869, went into that elevator for storage and trans'hipment?

A. In 1868, I think, there were between two and three million received, and in 1869 say half a million bushels received.

Q. Were your firm out of business in the busiest part of the year 1869?

A. I think the month following our suspension was probably the busiest season of the year.

Q. Was the vast quantity of grain which you have spoken of as having been in the warehouse in 1868, either for storage or trans'hipment, received from divers and various persons and parties, and forwarded or shipped to New York City, and other places in the State of New York, or other places to divers persons and parties?

A. Yes, sir.

Q. How long have you done business with defendants in these suits?

A. Some time in 1868, with Messrs. Dows & Co., until October last.

Q. Did the firm of A. F. Smith & Co. have considerable correspondence with David Dows & Co. during the years 1868 and 1869?

A. We had some in 1868, and a good deal in 1869.

Q. Who of your firm did the part of the correspondence with Dows & Co.?

A. I think I did.

Q. Were the letters written by A. F. Smith & Co. to the defendants Dows & Co. usually written under a printed or lithograph heading, similar to the one now shown you?

A. They usually were similar to the one here produced by me, and annexed to this deposition, marked Exhibit No. 57, (A. B. G.)

Q. Is the Corn Exchange Elevator mentioned in the fore part of your deposition the one which, by the letter-head, Exhibit No. 57, A. F. Smith & Co. appear to be proprietors of?

A. It is, and there is but one warehouse in Oswego known as the Corn Exchange Elevator.

Q. Who usually opened the letters addressed to the firm?

A. Either Mr. Smith or myself.

Q. Who usually took the letters to the post office, and who received

the letters addressed to A. F. Smith & Co., from the post-office, or the Corn Exchange Elevator?

A. I think we had a boy there who took the letters to and from the post-office.

Q. Were the letters addressed to A. F. Smith & Co., or the Corn Exchange Elevator, opened either by yourself or A. F. Smith?

A. I don't know that they were always; they were generally.

Q. What other person opened the letters?

A. I don't know of any other person that did; if any person did, it was Mr. Forsyth.

Q. Did the Corn Exchange Elevator, or A. F. Smith & Co., receive any letter, or letters, or orders, in the months of Sept. and Oct., 1869, from the Merchants' Bank, at Watertown, in relation to the cargoes of the Kate Kelly, Grenada, or Corsican, or either of them?

70 A. I think we received letters from the bank in relation to those cargoes; orders to the captains, I presume, were generally enclosed, to be delivered to the captains.

Q. Were the orders enclosed in a separate envelope, or did they come enclosed in a letter?

A. I think they came enclosed in a letter, addressed to A. F. Smith & Co.

Q. Did the firm of A. F. Smith & Co., or any member of said firm, or any person in the employ of said firm, deliver any of the letters sent by the Merchants' Bank to A. F. Smith & Co., to the defendants, or either of them, or to their counsel; and if so, when were they so delivered?

A. I have seen a number of the letters, laying on the table of the office of the commissioner, from the Merchants' Bank, since this examination commenced; I think I gave a letter to Mr. Van Santvoord, or Mr. Orr; I think I gave them two of the letters, and Mr. Orr or Mr. Van Santvoord returned to me a handful of them.

Q. When did you deliver these letters to Mr. Van Santvoord or Mr. Orr?

A. Some time since the commencement of this examination; I think one day last week, and on the day of the commencement of Mr. Moffit's examination.

Q. Have you these two letters now in your possession, or under your control?

A. I have.

Q. Will you produce them?

A. I will; I have one here, which I now produce, and the other is at our office, which I will produce.

Q. Look at the Exhibit F, (A. B. G.,) and state whether it is a copy of the original letter you now produce.

A. It is.

(NOTE.—Said exhibit is attached to the deposition of J. F. Moffit by the commissioner.)

Q. Did A. F. Smith & Co. receive other letters from the Merchants' Bank than the two you have mentioned, containing orders for the captains in relation to the cargoes of either of the vessels last named?

A. I think we received letters enclosing orders for the captains in all those cases.

Q. Have you made a thorough search in your office for all the letters of a similar tenor, of which Exhibit F (A. B. G.) is a copy?

A. I have, and could find but two; one beside the one mentioned in this question.

Q. Has the firm of A. F. Smith & Co. the order sent by the Merchants' Bank, in the said letters, to be delivered to the captains of the said schooners, Kate Kelly, Corsican, and Grenada?

A. Not to my knowledge; I suppose they were delivered to the captains; they would be in due course.

Plaintiff read Ex. 57, being printed heading of letters of A. F. Smith & Co., and letter Ex. F, attached to deposition of Moffitt.

Defendants' counsel then read from direct examination:

Q. Were the two letters found on the file of letters, or in the usual place of keeping file of letters of A. F. Smith & Co.?

A. They were not among the file of letters; I found them in a drawer, among other unfiled letters.

Cross-examination by Mr. Van Santvoord:

Q. What was the business of A. F. Smith & Co. in 1868 and 1869?

A. Dealers in grain and produce, and commission merchants.

71 Q. Were they proprietors, as such, of the Corn Exchange Elevator?

A. Yes, sir.

Q. Were their transactions in 1868 and 1869, for the purchase of grain for their own account, very large for Oswego?

A. They were.

Q. You stated, on your direct, that you received into the Corn Exchange Elevator, in 1868, two millions or three millions bushels for storage, and in 1869 some half million or so; what do you mean by saying that you received that quantity of wheat for storage?

A. I mean that that quantity of grain passed through the elevator, subject to charge for storage.

Q. Is a charge made on your books on all grain that comes into or passes through the elevator, of storage, whether taken in for your own account, or for sale on commission, or for trans'hipment, or to hold as warehousemen?

A. Yes, sir. All grain passing through the warehouse is subject to storage, in whatever character we receive it.

Q. If it is for your own account, to whom is that storage charged?

A. Charged to A. F. Smith & Co.

Q. And if for other parties, whether held on commission or otherwise, is it charged to these other parties for whom it is held?

A. It is.

Q. Is that the practice in the other elevating warehouses?

A. As far as I know, it is the invariable practice.

Q. In the entries from the grain-book, to which you have testified on your direct, I observe you testified to charges for storages; will you state to whom those charges were charged?

A. Charged to A. F. Smith & Co.; in these instances, I presume, they were charged directly to A. F. Smith & Co.'s wheat account.

Q. What of the grain received into the elevating warehouse in 1868 and 1869, amounting from two to three millions in 1868, and half a million in 1869? What proportion of that was received there by you for your own account, or for sale on commission?

A. I can't tell what proportion, but a pretty large proportion, I should think; probably two-thirds of the grain received; I have not looked the books over to see.

Q. Excluding the grain received into the warehouse purchased for your own account, and received by you at the warehouse for sale on commission, and the grain received for trans'hipment as a commission

merchant, what proportion would be left of grain received as warehousemen for storage only?

A. I cannot answer accurately without looking at my books, but it would be small compared with the whole.

Q. Was or was not your principal business at the elevator—the receipt during those years of grain for sale for your own account, or on commission, or for trans'hipment by you as commission men—for western or Canadian correspondents?

A. It was.

Q. What was the nature of your transactions with the defendants, David Dows & Co.?

A. It was consigning property to them for sale on commission, as to David Dows & Co., under advances made by them.

Q. Did A. F. Smith & Co. ever have any transactions with David Dows & Co. as warehousemen?

A. We had not.

Q. In the receipt of grain into the elevator, according to the course of business, was a tally made and kept, at the time of the grain going into the elevator from the vessel, of the quantity of wheat or other grain received from the vessel?

72 A. Yes, sir.

Q. Would that tally, if correctly kept, show the quantity of grain received at the elevator into the warehouse?

A. Yes, sir.

Q. Do these tallies also show for whose account the wheat or grain is received into the warehouse?

A. They do generally; yes, sir.

Q. According to the course of business at the warehouse, are tallies kept of the deliveries from the elevating-warehouse at the time of the respective deliveries?

A. Yes, sir.

Q. Is it from those tallies of receipts and deliveries that the entries of the receipts and deliveries are made in the grain-book, to which you have testified?

A. It is; yes, sir.

Q. On some of those bills of lading contained in the shipping-book are designations of the name of a vessel; on how many and on which of such bills of lading are such designations found?

A. On Exhibit No. 46, Kate Kelly; on Exhibit No. 47, Kate Kelly; on Exhibit No. 48, ex Grenada; on Exhibit No. 52, Thomas Parsons and Atmosphere; on Exhibit No. 53, Atmosphere; on Exhibit No. 54, Atmosphere, Corsican, Phalarope; on Exhibit No. 24, ex Atwater.

Q. In whose handwriting are the names of those vessels on the bills of lading in the shipping-book?

A. In the handwriting of Mr. Forsyth, the book-keeper of A. F. Smith & Co.; they are all in his handwriting.

Q. Were those bills of lading in the book retained at the office of A. F. Smith & Co. as vouchers for the delivering to the canal-boats mentioned in them?

A. They were.

Q. Were other bills of lading sent to the respective consignees mentioned in the margin of those retained at the elevating warehouse?

A. Yes, sir.

Q. Did the bills of lading transmitted to those consignees in New York contain the names of those lake vessels which are designated on the bills of A. F. Smith & Co.?

A. I think not.

Q. In taking in grain from vessels, is the grain from each vessel kept separate by itself, without intermixture with grain of the like quality?

A. On taking in grain for other parties we always kept it separate; and when we take it in for ourselves, we very frequently mix it, for convenience, if of the same quality.

Q. Do you know whether that was done in respect to the wheat rec'ived from the vessels named here; and, if so, to what extent?

A. I do not know except from the books; and from them I should judge it had been done in some instances.

Q. According to the course of business at the elevator, would the entries of deliveries in the grain-book, to which you have testified, show anything more than deliveries of wheat of like quality, and in quantities aggregating in quantity to the wheat received from the vessel, designated on the receiving side of the folio?

A. I think they do not show anything more than that.

Q. Do the statements of the lake vessels on the bills of lading, in the shipping-book, and of the quantities received from those vessels, on such bills of lading, correspond with the entries of deliveries in the grain-book, to which you have testified?

A. I think they agree as far as they go. After examination, I think they correspond throughout.

73 Q. In whose handwriting are the entries in the receiving tally-book, of which Exhibit No. 36 is a copy?

A. The heading is the handwriting of Mr. McCanna. The figures are part Mr. Bough's and part Mr. Burgess' handwriting, I think.

Q. How of Exhibit No. 27, of the Kate Kelly?

A. The heading is in the handwriting of Mr. McCanna, and the figures, I should think, in the handwriting of Mr. Burgess.

Q. In whose handwriting is the tally, of which Exhibit No. 28 is a copy?

A. The heading is in the handwriting of Mr. McCanna, and figures a part of them in handwriting of Bough and part in handwriting of Burgess, I think.

Q. In whose handwriting is tally of which Exhibit No. 32 is a copy?

A. Heading in handwriting of Mr. McCanna, figures in handwriting of Mr. Burgess, all of them, I think.

Q. In whose handwriting are the delivery tallies of which Exhibit No. 35, Exhibit No. 36, and Exhibit No. 40 are, respectively, copies?

A. I think the headings of all of them are in the handwriting of Mr. McCanna, and the figures in the handwriting of Bough, Burgess, or Maxon. I can identify Mr. Bough's handwriting. The figures in Exhibit No. 34 are in the handwriting of either Maxon or Burgess, I should think. In Exhibit No. 35, in the handwriting, part of them of Bough's, and part of them in Burgess' or Maxon's; I can't tell which.

MAY 7TH.—The figures in the entry in the delivery tally-books, of which Exhibit No. 36 is a copy, are in the handwriting, part of Bough and in Maxon's or Burgess', I think. The figures in the entry in the delivery tally-book, of which Exhibit No. 40 is a copy, are in the handwriting of Bough. The figures in the entry in the delivery tally-book, of which Exhibit No. 41, A, is a copy, are in the handwriting, part Bough's and part Burgess' or Maxon's. I am not positive of the figures of Burgess or Maxon, as I am not familiar with their handwriting.

Q. Do the tallies of deliveries, of which copies marked Exhibits Nos. 34 to 41, inclusive, are copies, complete the entries of delivery from the tally-book of the vessels

A. With the exhibit now produced, marked Exhibit No. 41, A, they present complete copies of entries, from the tally-books, of the delivery of the cargoes of the vessels named.

[NOTE.—Said exhibit here produced and made a part of this deposition and hereto annexed, and marked Exhibit No. 41, A, (A. B. G.)]

Q. Will you look, in their order respectively, at the entries in the tally-book, of which Exhibits 26 to 33, both inclusive, are copies, and state whether any, and which of them, indicate the bin or bins into which the wheat received from each vessel was placed?

A. Exhibit No. 26 indicates that the wheat from the Atwater went into bins 4, 26, 8, and 28, without indicating how much went into each bin. It does indicate that 12,673 bushels went into the four bins. Exhibit No. 27 indicates that the wheat from the Kate Kelly went into bins 28, 5, and 7; that 7,996 bushels and 44 pounds went into bins 28, 5, and 7, without indicating how much went into each bin; and that another portion, 360 bushels, went into the middle team-bin; also, that 210 bushels went into the south team-bin; also, that 360 bushels went into the north team-bin. Exhibit No. 28 indicates that the wheat from the Grenada went into bins 4, 25, 26, 4, and 6, and the whole
74 quantity that went into those bins was 12,142 bushels and 9 pounds, without indicating how much went into each. It also indicates that 360 bushels went into the south team-bin; and this completes the whole cargo, excepts 2,000 bushels, which went into the boat Cambeau. Exhibit No. 29 indicates the wheat from the Gerrit Smith, which went into bins 6, 7, 25, and 32; and the whole amount that went into those bins was 14,049 bushels and 10 pounds, without indicating how much went into each. It also indicates that 360 bushels went into north team-bin; also that 640 bushels went into south team-bin; also that 360 bushels went into middle team-bin; and this appears to complete this cargo. Exhibit No. 30 indicates that the wheat from the Thomas Parsons went into bins 26, 3, and 4. The quantity which went into those bins was 11,334 bushels and 27 pounds, without indicating how much went into each bin. Exhibit No. 31 indicates that the wheat from the Atmosphere went into bins 8, 10, 32, and 30. Total amount that went into those bins was 14,850 bushels and 47 pounds, without indicating the quantity which went into each bin. Exhibit No. 32 indicates that the wheat from the Corsican went into bins 3, 4, 25, and 26. The whole amount that went into those bins was 6,302 bushels and 5 pounds, without indicating how much went into each bin. Exhibit No. 33 indicates that the wheat from the D. G. Fort went into bins 29, 30, 12, and 25. Total quantity that went into those bins was 9,860 bushels and 28 pounds, without indicating how much went into each bin.

Q. In whose handwriting are the figures indicating the bins?

A. Generally in the handwriting of the weighman, whoever he may be.

Q. And are they made contemporaneously with the receipt and transmission of the grain to the bin?

A. They are, in the usual course of business.

Q. What is the capacity of those bins, except the team-bins?

A. I think from four to five thousand bushels. I don't know precisely.

Q. Is the grain put into the bin at the top and taken out at the bottom?

A. It is.

Q. Will you look at the tally of deliveries, of which Exhibits Nos. 34 to 41, inclusive, are copies in their order, and begin with the first and

state whether there are any and what indications of the bins from which each delivery was made?

A. There is no indication on Exhibit No. 34 to indicate what bins the grain was delivered from. There are no indications on Exhibit No. 35 to show what bins the grain was delivered from. Exhibit No. 36 indicates that 7,100 bushels of the cargo of the Grenada was delivered to the boat B. Hagaman, from bins 25, 26, 4, and 6, and no other indications as to the bins from which the grain was delivered on said exhibit. There are no indications on Exhibit No. 37 to show from what bins the grain was delivered. Exhibit No. 38 indicates that there was delivered to the boat Mine Dingman, from the cargo of the Thomas Parsons, 4,600 bushels of wheat, from bins 3, 4, and 26, and no indication as to the residue. There are no indications on Exhibit No. 39 showing what bins the grain was delivered from. There are no indications on Exhibit No. 40 showing as to what bins the wheat was delivered from. There are no indications on Exhibit No. 41 as to the bins the grain was delivered from. There are no indications on Exhibit No. 41, A, showing as to the bins the grain was delivered from.

75 Q. Are there not entries on Exhibit No. 41, A, showing deliveries from or on account of vessels other than the eight named?

A. There are for or on account of the schooners Phalarope and Camanche.

Q. Were those vessels from which wheat was received for account of A. F. Smith & C.?

A. The cargoes of those vessels were for account of A. F. Smith & Co.

Q. Would it not be more correct, or more in accordance with the fact, to call tallies of deliveries to which you have testified, tallies of deliveries for or on account of the schooners Atmosphere, Kate Kelly, &c., instead of calling them tallies of deliveries from the Atmosphere, Kate Kelly, &c.?

A. I think it would, perhaps, be more accurate, and perhaps more in accordance with the fact.

Q. Could you tell, from these entries, what proportion of the deliveries was actually from the eight vessels, and what from other sources?

A. I could not, and cannot. If I had had charge of the elevator I might possibly. I could not tell from the entries.

Q. So far as the elevator is concern'd, in the keeping of its accounts of receipts and deliveries, would the receipts for account of A. F. Smith & Co. be discharged by tallies or entries charged against such receipts of deliveries of the like quantity in the aggregate, and like quality?

A. I think so.

Q. Were the several cargoes of wheat received from the vessels named—the Kate Kelly, Grenada, and Corsican—received as per tallies of receipts to which you have testified, purchased by A. F. Smith & Co., at Milwaukee?

A. They were.

Q. How were those purchases made?

A. Made through commission-houses in Milwaukee.

Q. Were they made through such commission-merchants by order from Oswego, either by telegram or letter or both, and by receipt of invoices, and acceptance or payment of sight-drafts, and acceptance of time-drafts?

A. The purchases were so made.

Q. Through what commission-house was the wheat by the Kate Kelly, the Grenada, and the Corsican purchased?

A. Through W. P. McLaren & Co., Milwaukee.

Q. Will you produce the correspondence by letter or telegram relating to the purchase of the several cargoes of wheat by the vessels, in their order?

A. I will, beginning with the Kate Kelly. First, I produce a telegram from A. F. Smith & Co. to W. P. McLaren & Co., dated August 28, 1869, a copy of which is hereto annexed, and marked Exhibit K. G. C., No. 1, (A. B. G.) The same was here read in evidence.

Q. Is that telegram in ciphers, and, if so, translate it into common English.

A. It is in part, and the translation is given under this exhibit of the words and phrases in cipher. The next is a copy of a letter from the letter-press book of A. F. Smith & Company, dated August 28, 1869, from A. F. Smith & Co. to W. P. McLaren & Co., a copy of which is hereto annexed, and marked Exhibit K. G. C., No. 2, (A. B. G.,) here read in evidence.

Q. Is that letter partly in cipher?

A. Yes, sir. It repeats the telegram. The words in cipher are interpreted above at foot of Exhibit K. G. C., No. 1. The next is a letter from W. P. McLaren & Co. to A. F. Smith & Co., dated the 28th of August, 1869, a copy of which is hereto annexed, and marked Exhibit K. G. C., No. 3, (A. B. G.,) here read in evidence. The next is a tele-
76 gram from A. F. Smith & Co. to W. P. McLaren & Co., dated Aug. 30, 1869, a copy of which is hereto annexed, and marked Exhibit K. G. C., No. 4, (A. B. G.,) here read in evidence. This telegram is partly in cipher, and translation of words in cipher noted below the copy telegram annexed. The next is a copy of a letter from A. F. Smith & Co. to W. P. McLaren & Co., dated August 30, 1869, a copy of which is hereto annexed, and marked Exhibit K. G. C., No. 5, (A. B. G.,) here read in evidence. There are words in cipher in this letter, interpreted at the foot of last above-mentioned telegram. The next is a letter from W. P. McLaren & Co. to A. F. Smith & Co., dated August 30, 1869, a copy of which is hereto annexed, and marked Exhibit K. G. C., No. 6, (A. B. G.,) here read in evidence. The next is a letter from W. P. McLaren & Co. to A. F. Smith & Co., dated August 31, 1869, a copy of which is hereto annexed, and marked Exhibit K. G. C., No. 7, (A. B. G.,) here read in evidence. The next is a copy letter from A. F. Smith & Co. to W. P. McLaren & Co., dated Sept. 1st, 1869, a copy of which is hereto annexed, and marked Exhibit K. G. C., No. 8, (A. B. G.,) here read in evidence. The next is a letter from W. P. McLaren & Co. to A. F. Smith & Co., dated September 2d, 1869, a copy of which is hereto annexed, and marked Exhibit K. G. C., No. 9, (A. B. G.,) here read in evidence, enclosing invoice Kate Kelly.

Q. When was that letter received?

A. I think on the 4th of September, 1869. The invoice came enclosed in it, of the Kate Kelly. The next is a copy letter from A. F. Smith & Co. to W. P. McLaren & Co., dated Sept. 4th, 1869, a copy of which is hereto annexed, and marked Exhibit K. G. C., No. 10, (A. B. G.,) here read in evidence.

Q. Look at the document now shown you, of which a copy is hereto annexed, marked Exhibit K. G. C., No. 11, (A. B. G.,) invoice marked K. G. C., No. 11, (A. B. G.,) here read in evidence, and state what that document is.

A. Invoice of cargo of wheat of the schooner Kate Kelly, from W. P. McLaren & Co., Milwaukee.

Q. In what letter was that invoice received?

A. This is the invoice which came in the letter from W. P. McLaren & Co., dated Sept. 2d, 1869, and marked Exhibit K. G. C., No. 9.

Q. Was the sight-draft and the time-draft mentioned in the invoice presented to you, the first for acceptance or payment, and the time-drafts for acceptance, and when and through what bank?

A. They were presented for payment and acceptance by the Merchants' Bank of Watertown, at or about the 6th of September, 1869. The sight-draft was paid, and the time-draft accepted before the arrival of the vessel, and before it was due.

Q. Was either of the time-drafts paid, and which?

A. The draft at thirty days, of $7,500, was paid at maturity.

Q. Is the sight-draft now produced by you, hereto annexed and marked Exhibit K. G. C., No. 12, (A. B. G.,) copy of the sight-draft which was paid?

A. It is. The time-draft which was paid I have looked for and can't find. (Here copy sight-draft K. G. C., No. 12, read in evidence.)

Q. Will you produce the next letter or telegram relating to these cargoes?

A. I will; and first I produce a copy of letter from the letter-press book of A. F. Smith & Co., from A. F. Smith & Co. to W. P. McLaren & Co., Milwaukee, dated September 6, 1869, a copy of which is hereto annexed, and marked Exhibit K. G. C., No. 14, (A. B. G.,) here read in evidence.

77 The next is a copy of letter from A. F. Smith & Co. to W. P. McLaren & Co., dated September 7, 1869, a copy of which is hereto annexed, and marked Exhibit K. G. C., No. 15, (A. B. G.,) here read in evidence. The next is a telegram from W. P. McLaren & Co. to A. F. Smith & Co., dated September 8, 1869, a copy of which is hereto annexed, and marked Exhibit K. G. C., No. 16, (A. B. G.,) here read in evidence. An interpretation of the cipher is at the foot of the last exhibit. The next is a letter from W. P. McLaren & Co. to A. F. Smith & Co., dated September 8, 1869, a copy of which is hereto annexed, Exhibit K. G. C., No. 17, (A. B. G.,) here read in evidence. The next is a letter from copy-book of A. F. Smith & Co., from A. F. Smith & Co. to W. P. McLaren & Co., dated September 9, 1869, a copy of which is hereto annexed, and marked Exhibit K. G. C., No. 18, (A. B. G.,) here read in evidence. The next is a telegram from W. P. McLaren & Co. to A. F. Smith & Co, dated September 9, 1869, a copy of which is hereto annexed, and marked Exhibit K. G. C., No. 19, (A. B. G.,) here read in evidence. The interpretation of the cipher will be found at the foot of the last exhibit. The next is a letter from W. P. McLaren to A. F. Smith & Co., dated September 9, 1869, a copy of which is hereto annexed, and marked Exhibit K. G. C., No. 20, (A. B. G.,) here read in evidence. The next is a letter from W. P. McLaren & Co. to A. F. Smith & Co., dated September 11, 1869, a copy of which is hereto annexed, and marked Exhibit K. G. C., No. 21, (A. B. G.,) here read in evidence. The next is a letter from W. P. McLaren & Co. to A. F. Smith & Co., dated September 13, 1869, a copy of which is hereto annexed, and marked Exhibit K. G. C., No. 22, (A. B. G.,) here read in evidence. This letter contained the invoice of the cargo by the schooner Grenada. The next is a letter from A. F. Smith & Co. to W. P. McLaren & Co., dated September 14, 1869, a copy of which is hereto annexed, and marked Exhibit K. G. C., No. 23, (A. B. G.,) here read in evidence. The next is a letter from A. F. Smith & Co. to W. P. McLaren & Co., dated September 15, 1869, a copy of which is hereto annexed, and marked Exhibit K. G. C., No. 24, (A. B. G.,) here read in evidence.

Q. Look at the paper now produced and shown you, and state what that is and in what letter it came and when received.

A. It is the invoice of the cargo of wheat of the schooner Grenada, and came in the letter of W. P. McLaren & Co., dated September 13, 1869, of which Exhibit K. G. C., No. 22, is a copy, and was received on or about the 15th September, 1869. A copy of this invoice is hereto annexed, and marked Exhibit K. G. C., No. 25, (A. B. G.,) here read in evidence.

Q. Were the sight-drafts mentioned in that invoice presented to you for acceptance or payment, and the time-draft for acceptance, and when, and through what bank?

A. One of the sight-drafts for $2,500 was presented by the City Bank of Oswego, on or about the 6th of September, 1869, and paid; the sight-draft for $1,232.24, and the time-drafts presented by the Merchants' Bank of Watertown, on or about the 16th of September, 1869. The sight-draft was paid, and the time-drafts accepted. The said sight-drafts are now here in my possession, and copies are hereto annexed, and marked respectively Exhibit K. G. C., No. 26, (A. B. G.,) and Exhibit K. G. C., No. 27, (A. B. G.,) both here read in evidence.

Q. Were the sight-drafts paid, and the time-drafts accepted, before the Grenada was due at Oswego?

A. Yes, sir.

78 Q. Will you produce the next letter or telegram relating to these cargoes, or any of them?

A. I will; and, first, produce a letter-press copy from the letter-press copy-book of A. F. Smith & Co., from A. F. Smith & Co. to W. P. McLaren & Co., dated Sept. 22, 1869, a copy of which is hereto annexed, and marked Exhibit K. G. C., No. 28, (A. B. G.,) here read in evidence. The next is a letter from W. P. McLaren & Co. to A. F. Smith & Co., dated Sept. 24, 1869, a copy of which is hereto annexed, and marked Exhibit K. G. C., No. 29, (A. B. G.,) here read in evidence. The next is a telegram from W. P. McLaren & Co., dated Sept. 24, 1869, a copy of which is hereto annexed, and marked Exhibit K. G. C., No. 30, (A. B. G.) here read in evidence. The next is a letter from W. P. McLaren & Co. to A. F. Smith & Co., dated Sept. 25, 1869, a copy of which is hereto annexed, and marked Exhibit K. G. C., No. 31, (A. B. G.,) here read in evidence. The next is a telegram from W. P. McLaren & Co. to A. F. Smith & Co., dated Sept. 25, 1869, a copy of which is hereto annexed, and marked Exhibit K. G. C., No. 32, (A. B. G.,) here read in evidence. The next is a copy-letter from letter-press book, from A. F. Smith & Co. to W. P. McLaren & Co., dated Sept. 25, 1869, a copy of which is hereto annexed, and marked Exhibit K. G. C., No. 33, (A. B. G.,) here read in evidence. The next is a letter from W. P. McLaren & Co. to A. F. Smith & Co., now produced by me, dated Sept. 27, 1869, a copy of which is hereto annexed, and marked Exhibit K. G. C., No. 34, (A. B. G.,) here read in evidence. This letter contained the invoice of the cargo of the schooner Corsican, and was received by A. F. Smith & Co. about the 29th of Sept., 1869. The next is a copy-letter from letter-press book, from A. F. Smith & Co. to W. P. McLaren & Co., dated Sept. 29, 1869, a copy of which is hereto annexed, and marked Exhibit K. G. C., No. 35, (A. B. G.,) here read in evidence.

Q. Look at the papers produced and shown you, and state what that is.

A. Invoice of cargo of wheat of the schooner Corsican, from W. P. McLaren & Co., received in the letter of September 27, 1869, and of which Exhibit K. G. C., No. 34, is a copy.

(Copy of said invoice is hereto annexed, and marked Exhibit K. G. C., No. 36, (A. B. G.,) here read in evidence.)

Q. Was the sight-draft and the time-draft mentioned in the said invoice presented, the sight for payment, and the time-drafts for acceptance, and through what bank, and when?

A. They were so presented, through the Merchants' Bank of Watertown, on or about Oct. 1st, 1869. The sight-draft was paid, and the time-drafts accepted.

The defendants proposed to read the following question and answer:

Q. Did A. F. Smith & Co. ever authorize, or assent to, any instructions from the plaintiffs, or any of the plaintiffs, to the Merchants' Bank of Watertown, or the City Bank of Oswego, to withhold the delivery of the wheat, or any cargo of it, until the payment of the time-drafts, or any instructions to that effect?

(The plaintiffs objected to the reading of the question and answer as calling for testimony that is irrelevant, incompetent, and immaterial to the issue in this cause; the court sustained the objection, and defendants excepted.)

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A. No, sir.

Q. Who is Mr. Farwell, mentioned in the deposition of Mr. McLaren?

A. I suppose it to be Mr. F. R. Farwell, of Watertown; and he is the only Mr. Farwell we ever had any business relations with.

Q. Have you had particular charge of the correspondence of A. F. Smith & Co. in reference to this wheat in question?

A. I did when at home; and it was my particular branch of the business. I was absent from home about two weeks in September, attending my father and brother in their sickness.

Q. Have you had access to and examined the correspondence in relation to these cargoes, including letters in copy-book of A. F. Smith & Co., and letters received from the parties in Milwaukee, during the period from the order for the first cargo until after the date of the delivery of the last, at the Corn Exchange Elevator?

A. Yes, sir.

Q. Did A. F. Smith & Co. authorize Farwell to make any engagements with any parties in Milwaukee that the cargoes purchased for account of A. F. Smith & Co. should not go in any way into their control until all the drafts made on them were fully paid, or to that effect?

A. Never, to my knowledge.

Q. Were A. F. Smith & Co. ever advised of any such arrangement?

A. No, sir.

Q. Were A. F. Smith & Co. called upon for or did they give any warehouse receipts for any of these cargoes?

A. No, sir.

Q. At the time of the payment of the sight-draft, and the acceptance of the time-drafts, of each or either of these cargoes, did A. F. Smith & Co. make any express or special arrangement respecting the holding or disposition of the cargo against which the drafts were drawn in any case?

A. No, sir.

Q. Had A. F. Smith & Co. received cargoes by vessels against which drafts were drawn on them which came forward through the Merchants Bank of Watertown, before the receipt of the cargoes in question in these cases?

A. Yes, sir; frequently during the years 1868 and 1869.

Q. What is the date of the failure of A. F. Smith & Co.?

A. I think it was the 15th or 16th of October last; it was not earlier than the 15th.

Q. Before the date of your failure did the Merchants' Bank at Watertown, or any of its officers, look after or make any inquiries respecting the disposition of any wheat received from any of these vessels at the time of its receipt at the Corn Exchange Elevator, or at any time afterward?

A. No, sir; not to my knowledge.

Q. On receipt of the several cargoes of the vessels did A. F. Smith & Co. sell or dispose of it by consignments to New York, under advances, without reference to the maturity of the time drafts?

A. Yes, sir.

The defendants offered to read the following question and answer:

Q. Was there any difference in your relation, as you understood it, to a cargo before or after payment of the time-drafts as to the disposal of it, except that before the time acceptance was paid you might sell to raise money to pay the acceptance drawn against it, and after the payment of the acceptance without any accountability for proceeds?

80 (This question objected to, and specially to the words "as you understood it," by the plaintiff's counsel.)

A. As I understood it, there was no difference in our relation to the cargo as to our right to dispose of it before or after the payment of the time-drafts, after we had accepted the time-drafts and payment of the sight-drafts.

The judge sustained the objection, and the defendants excepted.

Q. Did the Merchants' Bank at Watertown ever give you any express authority, before or after the maturity of the time-drafts, to sell or dispose of any of these cargoes?

A. No, sir; we made none, and never asked for any.

Q. In reference to cargoes which came into your possession through the banks, under acceptances drawn against them, prior to the receipt of the wheat by the eight vessels, did you sell or dispose of these cargoes without reference to the maturity of the time-drafts, at any time after the payment of the sight-drafts and acceptance of the time-drafts?

A. Yes, sir.

Q. What was the amount of payments made by you on the cargo of Kate Kelly, including freight paid?

A. $13,206.24.

Q. What on the Grenada?

A. $5,472.24.

Q. What on the Corsican?

A. $5,030.93.

Whereupon the said witness was re-examined by Mr. Finch.

Q. Were you present at the Corn Exchange Elevator at the time all or either of the cargoes in question were delivered into that elevator?

A. I don't recollect that I was present; I might have been in the elevator at the receipt of those cargoes. I have no recollection of it, either way.

Q. Did you give any order or directions as to which bin or bins in the said warehouse said cargoes of wheat, or either of them, should be delivered?

A. I have no recollection of doing so.

Q. Do you know from whom the foreman, Mr. McCanna, obtained the statement made by him in the tally receiving-book, that the cargoes in question were for account of A. F. Smith & Co.?

A. I do not know; probably from Mr. Smith or myself.

Q. Have you any recollection of giving him statement, or directing him to enter it on said tally-book?

A. I have not.

Q. Was it or not in the usual course of business at said warehouse, when the order of delivery was for the account of any person or persons other than A. F. Smith & Co., to mix or intermingle different cargoes of wheat in the same bins?

A. It was not, without the permission of the parties owning or controlling the grain.

Q. Was it, to your knowledge, ever done during the time A. F. Smith & Co. have been proprietors of said warehouse?

A. I don't recollect of any such instance; the thing might have occurred.

Q. Would it have been unusual or extraordinary if such a thing had occurred?

A. I don't know that it would.

Q. Were the orders of A. F. Smith & Co. to the employees connected with the elevator, not to mix different cargoes in the same bin without special orders?

A. I think they had general instructions to that effect.

81 Q. Were different qualities or grades of grain deposited in the same bin during the months of September and October, 1869, in the said warehouse?

A. I don't know.

Q. Was it the usual course of business at said warehouse, during said period of time, to mix, or permit to be mixed, in the same bin two different grades or qualities of wheat?

A. It was not.

Q. Do you know, of your own knowledge, that any of the cargoes in question were mixed in the same bin in the said warehouse?

A. No, sir.

Q. Under such an order as is mentioned in Exhibit No. 16, (A. B. G.,) would the cargo mentioned in said order be stored with a cargo which was ordered to be delivered to the Corn Exchange Elevator for the account of David Ferguson, cashier, subject to the order of the Merchants' Bank?

A. That would depend upon who were the owners of the grain.

Q. If the title of the grain mentioned in the order, of which Exhibit No. 16, (A. B. G.,) endorsed or written on the bill of lading of said exhibit, was, at the time the cargo was deposited in the said warehouse, in the Milwaukee National Bank of Wisconsin, and the title of the cargo ordered to be delivered at said warehouse, for the account of David Ferguson, subject to the order of the Merchants' Bank, was in said Ferguson, would the said two cargoes, according to the usual course of business at said warehouse, be mixed in one bin?

A. They would not, if we understood that they were owned by two separate and distinct parties, without the consent of the owners.

Q. Were you present in warehouse known as the Corn Exchange Elevator at the time the eight cargoes in question, or either of them, were delivered to the canal-boats named in the several bills of lading produced by you during this examination?

A. I don't recollect whether I was present or not at any time during its delivery.

Q. Did you fill up any or either of the said bills of lading?

A. I think I did, one or two of them, except, possibly, some figures, and the names of the vessels from which the cargoes were delivered.

Q. Which of the said bills of lading did you fill up?

A. The bills of lading of the Four Sisters, George Ames, and Annie Rebecca.

Q. Did you or the firm of A. F. Smith & Co. receive from Merchants' Bank any order, request, or direction to ship any of the cargoes of the schooners Kate Kelly, Grenada, or Corsican?

A. No, sir.

Q. Were the said shipments made by said firm, or A. F. Smith & Co., without the knowledge or consent of the Merchants' Bank?

A. I don't know whether it was without their knowledge or not; we never asked their consent.

Q. When, as far as you know, did the Merchants' Bank first know or learn of the said shipments?

A. Shortly after our suspension, I suppose.

Q. Were each and all of the drafts which you, as one of the firm of A. F. Smith & Co., accepted, attached to bills of lading at the time of their acceptance?

A. No, sir; all that came from the Merchants' Bank, at Watertown, were not.

Q. Had the firm of A. F. Smith & Co. ordered the purchase of wheat from parties in Milwaukee prior to the cargoes in question,
82 which had been consigned for the account of Milwaukee banks, or their cashier, in case of the Merchants' Bank, at Watertown, N. Y.?

A. I presume they were so consigned; we had ordered grain purchased by parties in Milwaukee previous to the grain in question?

Q. Had the firm of A. F. Smith & Co. received letters from the Merchants' Bank, notifying or informing A. F. Smith & Co. of the said consignments?

A. I think we had in some cases, if not in all.

Q. Were the several orders sent by the Merchants' Bank to A. F. Smith & Co., to be delivered to the captains of the schooners, received by said firm in due course of mail?

A. I suppose they were.

Q. Did not the said letters and orders come then to Oswego, to said firm, at or about the time of the letters from the Merchants' Bank, enclosing the drafts, the sight-draft for payment, and the time-draft for acceptance?

A. They probably did.

Q. Then, were not the sight-drafts paid and the time-drafts accepted with a full knowledge, on the part of A. F. Smith & Co., that, in the language of the letter and orders, the wheat was to be delivered to A. F. Smith & Co. on the payment of the said drafts?

A. No, sir; we did not recognize the right of the Merchants' Bank, or any other bank, to withhold property which we had purchased.

Q. Did the firm of A. F. Smith & Co. pay the sight-drafts, and return to the Merchants' Bank the time-drafts accepted?

A. Yes, sir.

Q. Did A. F. Smith & Co. receive from the Merchants' Bank any other right or authority to take, receive, or hold possession of the wheat in question, other than the letters and orders sent by said bank to A. F. Smith & Co.?

A. No, sir; we wanted nothing else.

Q. In returning the drafts accepted to the Merchants' Bank, did A. F. Smith & Co., in any way and how, protest against the terms imposed by the letters, and the orders to the captains for the delivery of the cargoes?

A. Not to my knowledge. I don't know of anything to protest against.

Q. Prior to the presentation of the drafts which have been exhibited to you on this examination for payment or acceptance, had the firm of A. F. Smith & Co. paid a single cent on the purchase of the said cargoes in question, or either of them?

A. Yes, sir.

Q. Which of the cargoes, and when?

A. We were credited on the purchase of the Grenada, $2,487.50.

Q. For what?

A. Proceeds of a sight-draft in their hands—in the hands of W. P. McLaren & Co.

Q. Placed in their hands when, how, and by whom?

A. I suppose they obtained credit for a sight-draft on A. F. Smith & Co., dated September 3, 1869, for $2,500.

Q. Was the draft paid by A. F. Smith & Co.?

A. It was, and paid probably about the 6th of September, 1869.

Q. Is it true that A. F. Smith & Co. could not have been advised of the special directions or instructions accompanying the bills of lading sent to the City Bank of Oswego, or to the Merchants' Bank, after the receipt by them of the letters or orders for the delivery of the cargoes?

A. I don't know that it is true that they could not have been advised, but it is true that they were not so advised, so far as I know.

83 Q. Did you not, as one of the firm of A. F. Smith & Co., know by the terms of the letters and orders sent by the Merchants' Bank, and by the orders endorsed on the captain's bill of lading, that the grain was to be delivered to A. F. Smith & Co., or the Corn Exchange elevator, for the account of the cashiers of the different plaintiffs in these suits, subject to the orders of the banks, until the payment of the drafts mentioned in said letters or orders?

A. No, sir, I don't know that I did.

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Q. Please explain what you mean by your last answer?

A. I don't know what explanation it needs.

Q. Do you mean that the said letters or orders were not explicit in their terms; that the cargoes referred to were not to be delivered to A. F. Smith & Co. until the payment of the drafts therein mentioned?

A. The letters from the Merchants' Bank were explicit, expressed their instructions what they desired; but I did not understand from them that we were not to have the wheat because the wheat came into our possession without any difficulty; we understood when we bought the wheat we were to have it, and we got it.

Q. Was it for that reason, and no other, that A. F. Smith & Co. shipped, or caused to be shipped, said wheat, and all of it?

A. We sold it because we considered it our own, and disposed of it as our own.

Q. Were the margins for which the sight-draft was drawn, and which appears to be credited on the invoice of W. P. McLaren & Co., of the cargo of the Grenada, for or on account of transactions prior to or other than said cargo?

A. Yes, sir.

Q. In case of orders such as were given by the Merchants' Bank, who paid or advanced the lake-freights?

A. We did when the property was our own.

Q. Please answer my question.

A. The owner of the property would naturally pay it, I suppose.

Q. In case of the delivery of the wheat, under the particular orders given by the Merchants' Bank for the delivery of the cargoes in question, who, by the usual course of business, would advance or pay the lake-freights?

A. A. F. Smith & Co., owners of the cargoes, upon whom the drafts were drawn.

Q. You stated on your cross-examination, did you not, in substance, that as to the cargoes which came into your possession through the banks, under acceptances drawn against them prior to the receipt of the wheat by the vessels, you sold or disposed of said cargoes without reference to the maturity of the time-drafts, at any time after the payment of the sight-drafts and acceptance of the time-drafts; were said shipments or sales, as far as you know, made with the knowledge or consent of the banks in whose care the cargoes were consigned?

A. I think I so stated. We had no express consent, and I don't know that they had any knowledge of shipments or sales.

Q. Was there any understanding, arrangement, or agreement between A. F. Smith & Co. or the Merchants' Bank, at Watertown, that A. F. Smith & Co. might or could sell or dispose of the eight cargoes in question, or any or either of them, until payment of the several drafts drawn on the several cargoes?

A. There was not, to my knowledge.

84 Q. Was it, or not, in accordance with the usual and ordinary course of business at the Corn Exchange elevator, in case of the receipt of grain from lake vessels simply for storage or trans'hipment, for the proprietors of said elevator to advance or pay the freight on cargoes thus received?

A. Not unless the cargoes were owned by or consigned to A. F. Smith & Co. When grain was simply stored for other parties, we never paid freight.

The said witness being further cross-examined by Mr. Van Santvoord, defendants' counsel, further testified:

Q. Were A. F. Smith & Co., proprietors of the Corn Exhange elevator, and A. F. Smith & Co., the commission merchants, who did business at that elevator, the same A. F. Smith & Co. who were purchasers of the grain, and the drawers of the drafts against it which came through the Merchants' Bank at Watertown?

A. Yes, sir; one and the same.

Q. In cases of receipts of orders on the captains for delivery of cargoes received in letters from the Merchants' Bank, at Watertown, how did those letters come addressed?

A. I think they came addressed to A. F. Smith & Co., Oswego. I have no recollection of seeing a letter for us from the Merchants' Bank addressed in any other manner.

Q. Did letters enclosing orders on captains for delivery of cargo come to A. F. Smith & Co. from the Merchants' Bank, at Watertown, in the same envelope with letters from that bank enclosing drafts for acceptance?

A. I think not; I don't recollect positively whether they did or not.

Q. Did they arrive on the same date?

A. I think they did usually.

Q. Did you see the orders for the captains which came in the envelopes from the Merchants' Bank?

A. I presume I saw some of them; can't recollect.

Q. Do you recognize Exhibit No. 2 and No. 8, or any of them, attached to the deposition of Kellar or Moffitt, as the form of orders received from the Merchants' Bank for the captains?

A. I should think they were substantially the same form.

Q. Were the orders received by A. F. Smith & Co. from the Merchants' Bank delivered in the usual course of business to the captains of the vessels to whom they were addressed, on calling for them at the office of A. F. Smith & Co. on the arrival of the vessel?

A. Yes, sir.

Q. Did A. F. Smith & Co. receive from the Merchants' Bank any order or direction respecting the disposition of the property by any of those vessels, except the letter enclosing the order for the captain?

A. Nothing else, I think.

Q. What was the position of Mr. John H. Forsyth in your establishment?

A. He was our book-keeper, and the only person in our employment by the name of Forsyth.

Q. Was it any part of his business to attend to the settlement of the amount of freights paid to the captains of the vessels making deliveries at the Corn Exchange elevator?

A. Yes, sir; he usually settled with the captains in cases when he paid freight.

Q. What authority, if any, had he as to signing receipts to the captains?

A. He had general authority to do business of that kind, and had authority to sign receipts to the captains for the cargoes delivered.

Q. For what purpose were the receipts signed by him on captains' bill of lading so signed by him?

85 A. As vouchers to the captains for the amount of wheat delivered, and also contained statement of the amount of freight paid.

Q. Are those receipts in the form of warehouse receipts, issued at the elevator, where property is received for storage merely by A. F. Smith & Co., as warehousemen?

A. No, sir; they do not even indicate that they went into the warehouse.

Q. Was there any express agreement between the Merchants' Bank, at Watertown, and A. F. Smith & Co., in respect to the payment of the lake-freights to either of the six vessels, of which the cargo was consigned by bill of lading, to or through that bank?

A. No, sir.

Q. Is it not the general usage, where cargoes are delivered to the party upon whom drafts against it are drawn, for such party to pay the freight?

A. It is.

Q. Did the Merchants' Bank make any arrangement or provision for the payment of the freight on either of the vessels consigned to their care by the bill of lading, with drafts upon A. F. Smith & Co. accompanying them, except by directing the delivery of the wheat to A. F. Smith & Co., or at their elevator?

A. No, sir.

Q. According to the course of business at the Corn Exchange Elevator, where property is received merely on storage as warehousemen for other parties, do A. F. Smith & Co. pay either freight or insurance?

A. No, sir.

Q. Is there a difference in the commission charged at Milwaukee, in

cases where the purchase is all sight, or part time; and, if so, what is that difference?

A. There is a difference of half a cent a bushel, commissions; in cases where they draw at sight, is half a cent a bushel, and in cases where they draw part sight and part time, then the commission is one cent a bushel.

Q. Is there a difference in the rate of exchange charged by the banks in Milwaukee, in the negotiation of sight and time drafts made on A. F. Smith & Co. by their agents in Milwaukee, on account of purchases of wheat or grain, made by them for A. F. Smith & Co.'s account?

A. There is usually a difference from a quarter to five-eighths per cent. less on sight than on time drafts.

Q. Have you figured up the amount of discount and exchange charged by the banks in Milwaukee on each of the purchases in question?

A. I have.

(The plaintiff objected to his answer, as to the amounts on the cargoes of the Grenada, Kate Kelly, and Corsican. Objection sustained; defendants excepted.)

Redirect examination by Mr. Finch:

The plaintiff's counsel offered to read in evidence the following questions and the answer thereto:

Q. What was the market value of No. 1 Milwaukee wheat at Oswego, at or during the period of time from Sep. 16th, 1869, to Oct. 14, 1869?

Ans.	Sep.	16, 1869,	$1.47½	per	bushel.
	"	20, "	1.42		
	"	24, "	1.39 & 1.40	"	"
	"	27, "	1.40	"	"
	"	28, "	1.38	"	"
	"	30, "	1.38	"	"
86	Oct.	1st,	1.35	"	"
	"	5th,	1.30 @ 1.34	"	"
	"	9,	1.30		
	"	11,	1.25		
	"	14,	1.28 @ 1.29		

(Counsel for the defendants objected that such value was not the rule or measure of the plaintiff's recovery.

The court ruled that the value at Oswego could not affect the defendants.

The plaintiff's counsel in like manner offered the following two questions and the answers thereto:)

Q. What was the market value of No. 2 Milwaukee wheat at Oswego, at & during the period of time from Sep. 16, 1869, to Oct. 14, 1869?

Ans. The market value of such wheat was as follows, on the following days:

Sep.	20,	$1.35	per bushel.
"	22,	1.32	" "
"	29,	1.30	" "
Oct.	11,	1.17	" "

Q. Are these amounts made from actual sale of wheat on the days mentioned?

A. They are.

(Defendants' counsel made the like objection, and the court excluded the evidence.)

Recross by Mr. Van Santvoord:

Q. Were the sight-drafts, which were paid, and the time-drafts, which were accepted, drawn against these cargoes respectively, charged against the several cargoes, in your books?

A. They were charged to the several parties, to balance these credits.

Q. How did it happen that the invoices credited of a date later than the receipt of the invoices were not earlier credited?

A. Because we were pretty busy at that time, and the books were somewhat behind.

Q. Are the amounts opposite the names of vessels, on bills of lading, in the shipping-book, the amounts credited on books of A. F. Smith & Co., on account of receipts from the vessels named, respectively?

A. I think they are.

Q. On your direct you stated that the Corn Exchange Warehouse was a public warehouse; what did you mean by that?

A. If I called it so, I meant it was prepared to do business for anybody that would pay; it was the place where A. F. Smith & Co. did their business.

By Mr. Finch:

Q. Is the journal the book of original entries of the credits to which you have testified?

A. It is.

Q. State the entry in said journal of the cargoes of the Kate Kelly.

A. It is as follows:

87 "OSWEGO, *Sept.* 3*d*, 1869.

Wheat, W. P. McLaren & Co..... 18,779 16

14,254.20 bus. wh't, per acc't p'che Kate Kelly..... 18,779 16"

Q. Are the entries in relation to the other cargoes substantially the same in form?

A. I think they are.

Q. Are these the entries to which you have referred in your last cross-examination?

A. They are.

S. BICKFORD.

Taken, subscribed, and sworn to before me this 21st day of May, 1870.

ALFRED B. GETTY,
United States Commissioner.

Exhibit No. 27, *A. B. G.*—(*Bickford.*)

Schooner Kate Kelly, into boat Frank Alvord, September 16, '69, ac. A. F. S. & Co. Wheat, after-hatch.

Here are tallies of bushels of 60 pounds, footing up at 7,300 bushels. E.

Sch'r Kate Kelly, Sept. 16, '69, ac. A. F. S. & Co. Wheat, after-hatch. Bin 28.

Tallies of bushels,	3	147	10.60
	7	300	
	10	447	10
		210	
	10	657	10

Schooner Kate Kelly, Sept. 16, '69, for A. C. Thomas, 360 bus. wheat from forward-hatch.

Tallies footing 360. E. Middle bin.

Sch. Kate Kelly, Sept. 16, '69, for S. Graves, 210 bus. wh't, after-hatch. E. 210. South bin.

Schooner Kate Kelly, Sept. 16, '69, for Penfield & Stone, 360 bush. wheat from forward-hatch.

Tallies 360. North bin.

7,300 E.
3,147.10
360
210
360

11,377.10

Sch'r Kate Kelly, Sept. 16, '69, ac. A. F. Smith & Co., wheat, forward hatch, bins 5, 7.

49 34.60.

Tallies footing up at 4,849, 34.60.

11,377 10
4,849 34

16,226 44

88 *Exhibit No.* 28, *A. B. G.*, (*Bickford.*)

Schooner Grenada, Sept. 25, '69, ac. A. F. S. &. Co, wheat, bins 25, 26, 4, and 6.

Tallies footing up at 9,000, continued on other side.

Schooner Grenada, Sept. 25, '69, ac. A. F. S. & Co., team-bin, Geo. Fras'er, 360 bush. wheat.

Tallies footing 360, south bin.

Sch'r Grenada, Sept. 25th, 1869, ac. A. F. S. & Co., wheat, into boat Carubean.

Tallies footing 2,000.

Schooner Grenada, continued into store, bins 25, 26, 4, and 6.

Tallies footing up at 3,142.09.60.

9,000
2,000
3,142.09

14,142.09
360

14,502.09

Exhibit No. 32, *A. B. G.*

Schooner Corsican, Oct. 8, '69, ac. A. F. Smith & Co., wheat, bins 3, 4, 25, 26.

Tallies footing up at 6,302.05
7,056

13,358.05

Schooner Corsican, Oct. 8, '69, ac. A. F. S. & Co., wheat to boat Geo. Ames.

Tallies footing up at 7,056.

Exhibit No. 35, A. B. G., (Bickford.)

Deliver boat Cayuga Chief, order A. F. S. & Co., wheat, ex Kate Kelly, forward hatch, 4,849.34, Sept. 16, '69. E.
Tallies footing up at 4,849 34.60.
Deliver J. F. Allan, Sept. 18th, '69, order A. F. S. & Co., 100 bush. wheat, ex Kate Kelly, in bags.
100. E.
Deliver boat Four Sisters, order A. F. S. & Co., wheat, ex Kate Kelly, 3,047.10 bush., Sept. 18, '69.
Tallies footing up at 3,047 10.60. E.

89 *Exhibit No. 36, A. B. G. (Bickford.)*

Deliver boat Cayuga Chief, Sept. 25, '69, order A. F. S. & Co., wheat, ex Grenada, 3,000 bush.
Tallies footing up at 1,020. See other tally-book.
Deliver boat Cayuga Chief, September 25, 1869, order A. F. S. & Co., wheat, ex Grenada.
Tallies footing up at 1,980. See other tally-book.
Deliver D. B. Hanchett September 27, 1869, order A. F. S. & Co., wheat, ex Grenada, 100 bush. bags.
100. E. North bin.
Deliver J. C. Wright bush. wheat, ex Grenada, order A. F. S. & Co., September 27, 1869. 720.
720. E. Middle bin.
Deliver Pool & Clark, September 27, 1869, order A. F. S. & Co., 360 bush. wheat, ex Grenada.
E. 360. North bin.
Deliver boat B. Hagaman, September 27, 1869, order A. F. S. & Co., wheat, ex Grenada. Bins 25, 26, 4, & 6.
Tallies footing up at 2,520. See other tally-book.
Deliver boat B. Hagaman, September 27, 1869, order A. F. S. & Co., wheat, ex Grenada. Bins 25, 26, 4, & 6.
Tallies footing up at 4,580. See other tally-book.
Deliver L. H. Mills, September 28, 1869, order A. F. S. & Co., wheat, ex Grenada, 360 bushels.
360. North bin.
Deliver L. H. Mills, September 28, 1869, order A. F. S. & Co., wheat, ex Grenada.
302.09. E. South bin.
Deliver schr. Trader, September 25, 1869, order A. F. S. & Co., 200 bush. wheat, ex Grenada.
200. E.

Exhibit No. 40, A. B. G., (Bickford.)

Deliver boat Geo. Ames, October 8, 1869, order A. F. S. & Co., wheat, ex Corsican.
Tallies footing up at 780. E.

90 *Exhibit No. 41 A, A. B. G.*

Deliver Anna Rebecca, Oct. 8, '69, order A. F. S. & Co., wheat, ex Atmosphere, Phalrope, Camanche, and Corsican.
Tallies footing up at 7,200.
Deliver Slaton & Slawson, Oct. 16, '69, order Ranell & Kenyon, 220 bush. wheat, ex D. G. Fort and Corsican.
Tallies. E. 220. Middle bin.

Delivered b't Maid of Judea, Nov. 6, '69, order A. F. S. & Co., wheat, ex G. Smith and Corsican, 1,580 bush.
Tallies footing up at 1,500.
Deliver boat Harm and Port, Oct. 5, '69, order A. F. S. & Co., wheat, ex Parson and Atmosphere.

E. 2,220.
See other tally-book.

Deliver boat Harm and Post, Oct. 5th, 1869, order A. F. S. & Co., wheat, ex Parsons and Atmosphere.
Tallies footing up at..... 5,580
2,220
7,800

See other tally-book.

Exhibit No. 42, A. B. G., (Bickford.)

GRAIN RECEIVED.

Date.	Name of vessel.	Whose account.	Bushels,	lb.	Kinds of grain.	No. bins.
1869. Sept. 16	Schr. Kate Kelley.....	A. F. S. & Co.....	16,226	44	Wheat....	2, 85, 7
			16,226	44		
Sept. 24	Schr. Grenada.....	A. F. S. & Co.....	14,502	09	Wheat....	25, 26, 4, 6
			14,502	09		
Oct. 1	Schr. Gerrit Smith.....	A. F. S. & Co.....	15,409	10	Wheat....	6, 7, 25, 32
			15,409	10		

91 *Exhibit No. 43, A. B. G., (Bickford.)*

GRAIN DELIVERED.

Date.	How delivered.	Whose account.	Stored.	Spouted.	No. days.	Rate.	Folio.	Amount of charges.
Sept. 16	Bt. Frank Alvord	A. F. S. & Co	7,300					
" "	A. C. Thomas		360					
" "	S. Graves & Co		210					
" "	Penfield & Stone		360					
" "	Bt. Cayuga Chief		4,849.34					
" 18	J. F. Allen		100					
" "	Bt. Four Sisters		3,047.10					81 13
			16,226.44					81 13
Sept. 25	Geo. Frazier & Co	A. F. S. & Co	360					
" "	Penfield, Lyon & Co		2,000					
" "	Schr. Trader		200					
" "	Bt. Cayuga Chief		1,980					
" "	" "		1,020					
" 27	D. B. Hanchett		100					
" "	J. C. Wright		720					
" "	Pool & Clark		360					
" "	Bt. B. Hagaman		2,520					
" "	"		4,580					
" 28	L. H. Wills		360					
" "	"		302.09					72 51
			14,409.10					72 51
Oct. 1	Sylvester & Thompson	A. F. S. & Co	360					77 04
" "	Shead & Graves		640					
" "	L. Gill		360					
" "	Briant Bros		300					
" "	C. E. Jones		360					
" 2	Bt. Libbie Breed		3,840					
" "	"		3,900					
" 6	M. J. Cummings		1,500					
" 8	M. Merrick		360					
" "	Bt. Willard Johnson		700					
" "	L. Gill		360					
" 11	Hanchett & Delong		360					
" "	Woulton H. & Co		360					6 02
" 16	Railroad		1,649.10					
" "	Schofield & Sheldon		360					
			15,409.10					83 86

Exhibit No. 44, A. B. G., (Bickford.)

GRAIN RECEIVED.

Date.	Name of vessel.	Whose account.	Bushels.	Lbs.	Kinds of grain.	No. bins.
1869. Oct. 2	Schr. Thos. Parsons	A. F. S. & Co	18,734	27	Wheat	26, 3, 4
			18,734	27		
Oct. 3	Atmosphere	A. F. S. & Co	14,850	47	Wheat	8, 10, 32, 30
			14,850	47		
Oct. 8	Schr. Corsican	A. F. S. & Co	13,358	05	Wheat	3, 4, 25, 26
			13,358	05		

Exhibit No. 21, (A. B. G.)

Oct.	9	Schr. Atwater	A. F. S. & Co	16,954	26	Wheat	4, 26, 8, 28
				16,954	26		

Exhibit No. 19, (A. B. G.)

(Page 74.)

Oct.	9	Schr. D. G. Fort	A. F. S. & Co	17,510	28	Wheat	29, 30, 12, 25
				17,510	28		

92 *Exhibit No. 45, A. B. G., (Bickford.)*

GRAIN DELIVERED.

Date.	How delivered.	Whose account.	Stored.	Spouted.	No. days.	Rate.	Folio.	Amount of charges.
Oct. 2	Bt. Enterprise	A. F. S. & Co	7,400					93 67
4	" Mine Dingman		3,300					
"	" "		4,600					
"	" Harm & Post		2,220					
"	" "		1,214.27					
			18,734.27					93 67
Oct. 4	Bt. Harm & Post	A. F. S. & Co	4,365.33					74 25
5	" E. H. Case		3,000					
"	" "		4,660					
8	" Annie Rebecca		2,825 14					
			14,850.47					74 25
Oct. 8	Bt. Geo. Ames	A. F. S. & Co	7,056					66 79
"	" "		780					
"	" Annie Rebecca		4,358.27					
16	" Randal & K		124.32					2 91
"	Railroad		1,039.06					
			13,358.05					69 70

Exhibit No. 22, (A. B. G.)

Oct. 9	Bt. E. H. Shepherd	A. F. S. & Co	3,360					84 75
"	" "		4,281.26					
"	" A. Post		7,700					
16	" Randal & K		600					4 93
"	Railroad		1,013					
			16,954.26					88 86

Exhibit No. 20, (A. B. G.)

Oct. 9	Bt. Moses Melvin	A. F. S. & Co	7,650					87 50
"	" P. B. Davis		7,400					
12	" Maid of Judea		2,095					6 15
14	" Randal & K		360					
16	Railroad		9,528					
			17,510.28					93 70

Exhibit No. 47, (A. B. G.)

No. OSWEGO, N. Y., *Sept. 18th*, 1869.

Shipped by A. F. Smith & Co., as agents, and not as common carriers, in apparent good order, on board canal-boat Four Sisters, of Kasoag, captain the following described property, to be transported to the place of destination without unnecessary delay, and delivered to the consignees in like good order, as noted below, in the customary manner, free of lighterage, upon payment of freight and charges as prescribed in this bill; consignees to pay all harbor-towing from and to the usual place of landing. Three week-days, regardless of weather, after arrival and notice of same, to be allowed consignees to discharge this cargo, after which time the cargo or consignees are to pay demurrage, at the rate of two per cent. per day, upon the freight, (including tolls,) for each and every day of such demurrage over the three days as above specified, until the cargo is fully discharged. All damage caused by the boat or carrier, or deficiency in cargo, to be paid for by the carrier and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee. In case grain becomes heated while in transit, the carrier shall deliver his entire cargo and pay only for any deficiency, (caused by heating,) exceeding five bushels for each one thousand bushels.

93 The freight, charges, and demurrage payable to Sprague & Favill, or order, at place of destination, who is the agent of this captain and boat, and the only party authorized to collect the same, and whose receipt shall be in full of all demands on this cargo or bill of lading.

Ac. A. F. Smith & Co. 7,400 bush. No. 2 Mil. wheat.
David Dows & Co., New York.
Fr't hence to New York, eleven (11) cents per bush.
(Signed) G. A. BENNETT.

Exhibit No 48. A. B. G.

No . OSWEGO, N. Y., *Sept. 27th*, 1869.

Shipped by A. F. Smith & Co., as agents, and not as common carriers, in apparent good order, on board canal-boat B. Hagaman, of , captain , the following-described property, to be transported to the place of destination, without unnecessary delay, and delivered to the consignees in like good order, as noted below in the customary manner, free of lighterage, upon payment of freight and charges, as perscribed in this bill. Consignees to pay all harbor towing from and to the usual place of landing. Three week days regardless of weather, after arrival and notice of same, to be allowed consignees to discharge this cargo, after which time the cargo, or consignees are to pay demurrage, at the rate of two per cent. per day upon the freight (including tolls) for each and every day of such demurrage over the three days as above specified, until the cargo is fully discharged. All damage caused by the boat or carrier, or deficiency in cargo, to be paid for by the carrier and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee. In case grain becomes heated while in transit, the carrier shall deliver his entire cargo, and pay only for any deficiency (caused by heating) exceeding five bushels for each one thousand bushels.

The freight, charges, and demurrage payable to , or

order, at place of destination, who is the agent of this captain and boat, and the only party authorized to collect the same, and whose receipt shall be in full of all demands on this cargo or bill of lading.

Mess. David Dows & Co., 7,100 bus. No. 1 wheat.
New York, Ex. Granada.
Ac. A. F. S. & Co., E.
Freight to N. Y., twelve (12) c. per bush.
(Signed) G. A. BENETT.

Exhibit No 54, *A. B. G.*

No. OSWEGO, N. Y., *Oct. 8th*, 1869.

Shipped by A. F. Smith & Co., as agents, and not as common carriers, in apparent good order, on board canal-boat Anna Rebecca, of New York, Captain King, the following-described property, to be transported to the place of destination without unnecessary delay, and delivered to the consignees in like good order, as noted below, in the customary manner, free of lighterage, upon payment of freight and charges as prescribed in this bill. Consignees to pay all harbor towing from and to the usual place of landing. Three week days, regardless of weather, after arrival and notice of same, to be allowed consignees to discharge this cargo, after which time the cargo, or consignees, are to pay demurrage, at the rate of two per cent. per day upon the
94 freight (including tolls) for each and every day of such demurrage over the three days, as above specified, until the cargo is fully discharged. All damage caused by the boat or carrier, or deficiency in cargo to be paid for by the carrier and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee. In case grain becomes heated while in transit, the carrier shall deliver his entire cargo, and pay only for any deficiency (caused by heating) exceeding five bushels for each one thousand bushels.

The freight, charges, and demurrage payable to Sprague & Farvill, or order, at place of destination, who is the agent of this captain and boat, and the only party authorized to collect the same, and whose receipt shall be in full of all demands on this cargo or bill of lading.

Ac. A. F. Smith & Co., 7,200 bush. No. 1 Mil. wheat.
E. 2,825.14 Atmosphere.
Care David Dows & Co., E. 4,358.27 Corsican.
New York, E. 16.19 Phalrope.
E. 7,260
Fr't hence to N. Y., 18c. per bush.
(Signed) G. A. BENNETT.

Exhibit No 55, *A. B. G.*

No. OSWEGO, N. Y., *Oct. 18th*, 1869.

Shipped by A. F. Smith, & Co., as agents, and not as common carriers, in apparent good order, on board canal-boat Geo. Ames, of Oswego, Captain Watson, the following-described property, to be transported to the place of destination without unnecessary delay, and delivered to the consignees in like good order, as noted below, in the customary manner, free of lighterage, upon payment of freight and charges, as prescribed in this bill. Consignees to pay all harbor towing from and to the usual place of landing. Three week days, regardless of

weather, after arrival and notice of same, to be allowed consignees to discharge this cargo, after which time the cargo or consignees are to pay demurrage at the rate of two per cent. per day upon the freight (including tolls) for each and every day of such demurrage over the three days, as above specified, until the cargo is fully discharged. All damage caused by the boat or carrier, or deficiency in cargo, to be paid for by the carrier, and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee. In case grain becomes heated while in transit, the carrier shall deliver his entire cargo, and pay only for any deficiency (caused by heating) exceeding five bushels for each one thousand bushels.

The freight, charges, and demurrage payable to Sprague & Favill, or order, at place of destination, who is the agent of this captain and boat, and the only party authorized to collect the same, and whose receipt shall be in full of all demands on this cargo or bill of lading.

Ac. A. F. Smith & Co. 7,836 bus. 1 Mil. wheat,
Ex. Corsican.

Care David Dows & Co., E.
New York.
Fr't hence to N. Y., 18c. per bush.
(Signed) G. A. BENNETT.

Exhibit No. 57, A. B. G. (Bickford.)

[Office of A. F. Smith & Co., proprietors of the Corn Exchange Elevator. Commission merchants for the sale of all kinds of State, Western, and Canada grain.]

OSWEGO, N. Y., 186 .

95 *Exhibit K. G. C., No. 1, A. B. G., (Bickford.)*

(Blank No. 2.)

THE WESTERN UNION TELEGRAPH COMPANY,
Oswego, 28th August, 1869.

Send the following message, subject to the above terms, which are agreed to.

To W. P. MCLAREN & Co.,
Milwaukee:

By cargo Africa, Ramond, about sail freight, draw as before, Merchants' Bank. Also Poorly Arabic seller thorn, scent on cutter here.
A. F. SMITH & CO.

Africa No. 1 spring wheat.
Ramond, shipped by propeller.
Poorly, 2,000.
Arabic, No. 2 spring wheat.
Thorn, all September delivery.
"Scent," draws for wheat.
Margin, you require.

Exhibit K. G. C., No. 2, A. B. G., (Bickford.)

[Office of A. F. Smith & Co., proprietors of the Corn Exchange Elevator, commission merchants for the sale of all kinds of State, Western, and Canada grain.]

OSWEGO, N. Y., *August* 28, 1869.

Messrs. W. P. McLAREN & Co.,
Milwaukee:

GENTS: We gave you an order to-day to buy cargo Africa, Ramond, about sail-freights, drawn as before, Merchants' Bank. Also poorly, Arabia seller, thorn scent, in cutter here. We are almost entirely out of wheat, need some just as soon as we can get it, but don't want to pay much more fr't by propeller than sail; not over 1c. any way. Your despatch says Arabia seller Sept., $1.20; if we can get our freinds to buy some at about this pri., you may hear from us again soon. Some think it low now; we think it lower than it was.

Yours truly,

(Copy) A. F. S. & CO.

Exhibit K. G. C., No. 3, A. B. G., (Bickford.)

OFFICE OF W. P. McLAREN & Co.,
COMMISSION PRODUCE BUYERS,
Milwaukee, 28th Aug., 1869.

Messrs. A. F. SMITH & Co:

DEAR SIRS: Your dispatch ordering purchase cargo No. 1, shipped by the propeller, and 20,000 bus., No. 2, seller Sept., come in this P. M. Owing in part to a steamer excursion on the lake this afternoon, there has not been any market this p. m., and business is entirely adjourned over till Monday. Propellers ask 16c. fr't, an absurd figure, we think; but the W. T. Co. have no opposition, and are perfectly arbitrary, as we have before advised. No. 1 is exceedingly scarce, and it would take us a day or two to pick up a cargo, but it could probably be done in that time.

No propeller could be had before Wednesday; but a small-sized sail-vessel could be had probably 10½c. fr't. We advise you in regard to this by night message, as fully as possible, and will execute the order for S. O., early Monday. We think it most unlikely we could get consignment of a 5,000 lot of No. 2, to help to make up a cargo by sail. The owner thinks some of shipping, but not certain; the market closed
96 this noon quiet, but steady. No. 1 is nominally 1.29 (a) 1.30, but transactions not at all frequent; No. 2, 1.25½ cash—1.21½ seller, September last sales.

L'pool quoted 9/3 @ 9/4; our private dispatch says: Some quick dealers, selling from store, and this with good harvest, report poor demand, and fine weather; depress market, but we think an early reaction more than likely. Their chief reason for expecting this reaction (as we gather from former messages) is that they believe the fine weather, giving them nice dry wheat, has led farmers to overlook the blight, &c., which had its effect before the wheat ripened, and when they thresh it is thought the deficiency will become more apparent. They also say most of the wheat now arriving in L'pool is out of condition and helps depress the market. We give these views for what they are worth. Heavy rains for 36 hours past caused some advance to-day, but it has cleared off nicely again.

Yours, truly,

W'M P. McLAREN & CO.

Exhibit K. G. C., No. 4, A. B. G., (Bickford.)

AUG. 30, 1869.

Send the following message, subject to the above terms, which are agreed to.

To W. P. MCLAREN & Co.,
Milwaukee:

Ship soon possible. Cargo Africa and cargo Arabia sail. Look well to quality. Draw as before.

A. F. SMITH & CO.

Africa, No. 1 spring wheat.
Arabia, No. 2 spring wheat.

Exhibit K. G. C., No. 5, A. B. G., (Bickford.)

[Office of A. F. Smith & Co., proprieters of the Corn Exchange Elevator, commission merchants for the sale of all kinds of State, Western, and Canada grain.]

OSWEGO, N. Y., *Aug.* 30, 1869.

Mess. W. P. MCLAREN & Co.,
Milwaukee, Wis.

GENTLEMEN: Your dispatch of Saturday night received, and we have this A. M. advised you to buy for us as follows: Take option, your discretion, say five thousand a day, and ship soon as possible. Cargo Africa and cargo Arabia sail. Look well to quality; draw as before. We want this for our trade, and we say look well to quality, because there has been very much inferior wheat shipped from Milwaukee, and yet inspected one (1) and two (2,) lately, to what there was earlier in the season. You will draw as before, margin, sight, ball, thirty (30) and forty-five (45) days, Merchants' B., Watertown.

The option which we take on an order for our customers may be increased considerably from time to time, and they think you can use considerable discretion, and get in lower on options, providing you don't fill the order all in one day, and we have so given it to you by telegraph. They think you ought to get it at about twenty; however, you have the order.

Yours, truly,

A. F. SMITH & CO.

Exhibit K. G. C., No. 6, A. B. G., (Bickford.)

OFFICE OF W. P. MCLAREN & Co.,
COMMISSION PRODUCE BUYERS,
Milwaukee, 30 Aug., 1869.

Mess. A. F. SMITH & Co.

DEAR SIRS: Your tel'm in reply to our message Sat'y night
97 came to hand this A. M. We have to ask for some allowance if we cannot handle orders so promptly as usual, as it is the hardest time in the whole year to do anything, and there is hardly wheat enough here to keep deliveries moving. Out of our stock we have two houses (with considerable in them) where we would not buy for shipment; so that it takes some time to operate judiciously.

On looking into the exact position, we have decided that it is not

likely that we could buy a cargo of No. 1 wheat so as to get it shipped this week, and as there were orders for two more cargoes here this morning, No. 2 is by no means plenty either. We therefore have decided to charter a good-sized vessel, and put in, say, 4'@5,000 bush. No. 1, (with a bulk-head,) and the balance of No. 2, and have been judiciously picking up both qualities during the forenoon; have bo't, so far, some 6,000 bus. No. 2, at 1.25, 1.26; and 2,000 No. 1, at 1.28. We cannot get any more No. 1 to-day, but will increase our purchase of No. 2, and telegraph charter, &c. We have given our friend the privilege of putting in 4' @ 5,000 No. 2, on consignment, which he is to decide this p. m., this being, as we suppose, quite in accordance with your wishes.

We bo't 7,000 bus., seller, Sept., at 1.21½. We had taken 2,000 before your dispatch reached us, and then had only one chance to buy a 5,000 lot at same price, so took it.

We will fill up the order at about 5,000 per day, as you desire. There was much more disposition to buy, and less to sell for future delivery, and the closing prices were 1.22 @ '2½ No. 2; and 1.24 @ '4½ No. 1, Sept. delivery. L'pool comes to us still dull, and a little lower, but New York shows a firm market, and this caused cash wheat to close here firm, and good houses scarce. We doubt if Sept. wheat can be found much lower at present, certainly not unless foreign markets are quite weak.

Yours, truly,

W'M P. McLAREN & CO.

Exhibit K. G. C., No. 7, A. B. G.

OFFICE OF W'M P. McLAREN & CO.,
COMMISSION PRODUCE BUYERS,
Milwaukee, 31st Aug., 1869.

Mess. A. F. SMITH & CO.

DEAR SIRS: We sent you message this noon, that the foreign news had excited the market, and prices were higher; that we had completed your cargo at about 1.32 for No. 1. and 1.28 for No. 2, and bo't 5,000 No. 2, seller, Sept., at 1.24, now asking 1.26. The foreign news (private cable, at 9 7*d.*,) excited the market early, and as buyers were much more plenty than sellers, it was not easy to do anything. We advised yesterday we had bought every bus. of No. 1 offered for sale, and we only found our call this a. m., at 1.30, which we took, and at noon paid 1.32 for a few cars more. We still lack 3 or 4 cars, but will, no doubt, be able to secure them this p. m. We bought enough No. 2 to fill vessel up, at 1.28, (between 1' and 2,000 bus.,) and took 5,000 at 1.24 for Sept'r. The report that New York was 4 and 6 better, stimulated the market, and we closed strong at 1.28½ cash, and 1.26 seller, Sept., for No. 2; No. 1, cash, nominal, now held seller, Sept., 1.28. We will get the Kate Kelly off in the morning, if all is well.

Yours, truly,
(Signed) W'M P. McLAREN & CO.

98 *Exhibit K. G. C., No. 8, A. B. G.*

[Office of A. F. Smith & Co., proprietors of the Corn Exchange Elevator, commission merchants for the sale of all kinds of State, Western, and Canada grain.]

OSWEGO, N. Y., *Sept. 1st*, 1869.

Mess. W. P. McLAREN & CO.,
Milwaukee, Wis.

GENTS: Your favor of the 28th and 30th received; also, several telegrams; all satisfactory; but as two of our office men are away for a

short time, will not reply to them in detail. You may buy another cargo of No. 1 for our local trade, if possible, of the old wheat, for we shall need it before the new can be ground. If, however, it is difficult to get all No. 1 at once, fill cargo with part No. 2, and bulk-head as this last. Cargo No. 1 will suit best, if not over 3 to 5c. dearer. Draw Merchants' Bank, 30 to 45 days.

Yours, truly,

A. F. S. & CO.

Exhibit K. G. C., No. 9, A. B. G.

OFFICE OF W. P. McLAREN & Co.,
COMMISSION-PRODUCE BUYERS.
Milwaukee, 2 Sept., 1869.

Mess. A. F. SMITH & Co.,

DEAR SIRS: We bought 3,000 bush. seller, September, at 1.29, this morning, and advised you of same. Since received your order to sell option wheat at 1.30, or over, and have reported to you sale of 2,000 bus. at 1.30. We opened strong, and wheat advanced till No. 2, cash, sold at 1.32½, seller, Sept., 1.30, and No. 1, cash, 1.36. Although N. Y. is nominally 3c. @ 4c. better, we have a quieter feeling now, (noon,) and sales have just been made at 1.29¼, seller, Sept'r. We have the impression that wheat is not especially good property at 1.30, for this month, and feel rather glad that you disposed of yours. It will take one of two causes to keep it at that, or over: either continuous broken weather here, keeping back receipts, or very strong markets abroad. We have quite expected this reaction in L'pool, but have no idea that prices there will go any very high now; think about 10½, or so, which certainly will not afford 1.36 here this month. It may be, however, that they are really going still higher there. Our weather is fine and wheat should move next week, if the weather keeps at all good. We are sorry you did not leave the option order as at first sent; but of course it can't be helped. We hardly looked for this reaction of Europe for a week or so, but our Greek friends there have lowered the market all they could, to see a sudden turn to the other side. We inclose invoice of Kate Kelly cargo, and have drawn as noted. We also drew $2,400 on the 2,000 consigned. We will not draw any margins on the options, but arrange to let them lower each other, and perhaps by and by we can get them settled before the month expires. Yours of 30th here and duly noted.

Yours, truly,
(Signed,) W'M P. McLAREN & CO.

Exhibit K. G. C., No. 10, A. B. G., (Bickford.)

[Office of A. F. Smith & Co., proprietors of the Corn Exchange Elevator, commission merchants for the sale of all kinds of State, Western, and Canada grain.]

OSWEGO, N. Y., *September* 4, 1869.

Mess. W. P. McLAREN & Co.,
Milwaukee, Wis.

99 GENTLEMEN: Your favor, 2d inst., enclosing ac. purchase wheat for Kate Kelly, at hand and noted. The ac. will have our attention. Your d'ft, $2,400, also in and paid. We did not understand till

now that any portion of the cargo was on consignment. It is all right, however. We only wish it was more. Our impressions in relation to wheat coincides with yours, as previous letters will show We think sales @ 1.30 for September will be good unless all should be disappointed in the receipts.

Yours, truly,

A. F. SMITH & CO.

Exhibit K. G. C., No. 11, *A. B. G.*, (*Bickford.*)

Account purchase of 14,254.20 bus. wheat, bo't for account and by order of Messrs. A. F. Smith & Co., Oswego, N. Y., through W'm P. McLaren & Co.

A copy Ex. No. 4, is a copy of the invoice of shipment by Kate Kelly, (not here inserted for that reason,)

Exhibit K. G. C., No. 12, *A. B. G.*, (*Bickford.*)

$4,080 81.] MILWAUKEE, *September* 2, 1869.

[2-cent internal-revenue stamp, cancelled.]

At sight, pay to the order of W. G. Fitch, cashier, four thousand and eighty $\frac{80}{1000}$ dollars with N. Y. exchange, payable at Merchants' Bank, Watertown, N. Y., value received, and charge the same to account of

(Signed) W. P. McLAREN & CO.

To Messrs. A. F. SMITH & Co.

(Endorsed:) Pay Merchants' Bank, Watertown, or order, for collection, acc't of National Exchange Bank, Milwaukee.

(Signed) W. G. FITCH, *Cash.*

Exhibit K. G. C., No. 14, *A. B. G.*, (*Bickford.*)

[Office of A. F. Smith & Co., proprietors of the Corn Exchange Elevator, commission merchants for the sale of all kinds of State, Western, and Canada grain.]

OSWEGO, N. Y., *September* 6, 1869.

Mess. W. P. McLAREN & Co.,
Milwaukee, Wis.

GENTLEMEN: Yours of the 3d at hand and noted. Your draft is duly honored for margins, $2,500. We would thank you on the part of our customers, who have sold the 20,000 short, to cover as soon as you can make 5c. per bush. We would like to see it make them some money out of this, for we advised them to go into it. They say they never sold a bushel short before in their lives. Watch it close, and make them 5 c.; if possible, more. We don't believe in selling short, either; but just then it looked as though it might make some money, and it may. But we feel that with the present price of freights, &c., that wheat will not be laid down in this market and N. Y. at much less price than it is worth to-day. Hence we are willing to take a cargo, or two or three for our local trade now, at present prices of freights. If you have not filled the other order for the other load, please do so. Make it all No. 1, if possible to do so, and not be obliged to wait until freights advance to fill up

We expect to see freights go up to 20c. this fall. What is Germany fevering about, and what ails France?

Yours, truly,

A. F. SMITH & CO.

100 *Exhibit C. G. C., No. 15, A. B. G., (Bickford.)*

[Office of A. F. Smith & Co., proprietors of the Corn Exchange Elevator, commission merchants for the sale of all kinds of State, Western, and Canada grain.]

OSWEGO, N. Y., *Sept.* 7, 1869.

Messrs. W. P. McLAREN & Co.,
Milwaukee, Wis.

GENTS: Yours of the 4th at hand and noted. We think that with the increase in freights, insurance, &c., it will be well for us to put in a cargo or so more for our local trade now. You may, therefore, fill the order immediately, and engage freight. We shall be very busy with barley very soon, and want to get our grain for local in, and be ready for what may present. We don't think wheat will be much lower here until very late; the increase in transportation will eat up all the decline in price in your market, we think. Take all No. 1, if possible; if not, one and two. Look well to quality.

Yours, truly,

A. F. SMITH & CO.

Exhibit K. G. C., No. 16, A. B. G.

Blank No. 1.

THE WESTERN UNION TELEGRAPH COMPANY.

Dated Milwaukee, 8th, 1869. Received at Oswego, 8.35 p. m.

To A. F. SMITH & Co.:

Bought twenty thousand (20,000) twenty-five, (25½,) Sept. Market closing steady. Letter sixth (6th) rec'd. Will go on buying cargo. Africa scarce.

W. P. McLAREN & CO.

20 or 165 correct. Wrght Msg. H. P.

Africa, No. 1 spring wheat.

Exhibit K. G. C., No. 17, A. B. G.

OFFICE OF W. P. McLAREN & Co.,
COMMISSION PRODUCE BUYERS,
Milwaukee, 8th Sept., 1869.

Messrs. A. F. SMITH & Co.

DEAR SIRS: Your favor of 6th here to-day and noted. We agree with your views on the cost of wheat, laid down East on present basis, fr'ts, &c., yet there is about 10c. against a shipment to N. Y. to-day, and unless L'pool improves there cannot be anything in a shipment. We have dull advices from L'pool to-day, yet; but we rather think they will not

let it go much under 10/– at present. The market opened dull to-day, with No. 2 down to 1.24½ reg., and 1.23, seller, Sep., but recovered 1c. at noon. At 2 p. m. we had private advice of the firmer feeling at the close in N. Y., and prices opened on the street this p. m. 1½c. higher again. We advised you by wires of the advance, and soon after had your tel'm to fill in option at about 1.24c. Having rec'd your letter at 2.30, we had already taken 5,000 at 25½, and as we afterwards got your second
101 tel'm, to fill in at about 25, we took all we could at 1.25¼, 13,000 bus. in all. There was not much done this p. m.; few sellers, and some anxiety among "shorts" to cover. We shall report progress to-night by wires, and go on in the morning to buy balance, if market permits. We will also go on with another cargo, as ordered in your letter. It will be difficult to get much No. 1, and we will have to bulkhead in order to get cargo at all promptly. Our friend Morison wants to ship a few thousand more, and presume you will not object. We will draw as before, but our banks are beginning to feel the pressure for money to go into the country to move the wheat, and the time is no doubt coming when they will expect to do less and shorter time paper. We will, of course, do all we can at any time, and think we can almost always carry a fair portion of the cost of cargoes; at least, long enough to get them to their destination, and this our bankers think is doing their share. We agree with you in expecting higher fr'ts—asking 12½c. now.

Yours, truly,
(Signed) W'M P. McLAREN & CO.

P. S. Just bo't 7,000 bus. more, at 1.25¼, filling up the 20,000 bus-short.

Exhibit K. G. C., No. 18, *A. B. G., (Bickford.)*

[Office of A. F. Smith & Co., proprietors of the Corn Exchange Elevator, commission merchants for the sale of all kinds of State, Western, and Canada grain].

OSWEGO, N. Y., *Sept.* 9, 1869.

Messrs. W. P. McLAREN & Co.,
Milwaukee, Wis.

GENTS: We have your favor of 7th, and note what you say; also telegrams announcing the purchase of 20,000 4 wheat, to cover option. We suppose this transaction can be closed at once, and so our customers in interest understand it; and don't furnish us any margin on this trade, it has been so sharp and discreet. Fill up the load No. 1, and let it come without changing; if the sch'r Grenada is there, would sooner load her than a strange vessel.

Yours, truly, A. F. SMITH & CO.

Exhibit K. G. C., No. 19, *A. B. G., (Bickford.)*

Blank No. 1.

THE WESTERN UNION TELEGRAPH COMPANY.

Dated, Milwaukee, Sept. 9, 1869. Received at Oswego, 8.10 p. m.

To A. F. SMITH & Co:

Parrot about, point Africa aloft to half (½), reward capacity, poker, hubs, regard all, Africa, Negro, market, easy, Arabia, Allan half (½.)

W. P. McLAREN & CO.

To W. 1.65 collect, right msg. C. & P.

Parrot—we have bought. Allan—1.25. Point—10,000. Africa—no sp'g wheat. Aloft—1.29. Reward—we have chartered vessel. Poker —14,000. Hubs—12. Regard—we will ship as soon as possible. Negro—prospects of larger receipts affecting the market. Arabia—No. 2 spring wheat.

Exhibit K. G. C., No. 20, A. B. G., (Bickford.)

OFFICE OF W. P. MCLAREN & CO.,
COMMISSION PRODUCE BUYERS,
Milwaukee, Sept. 9th, 1869.

Messrs. A. F. SMITH & CO.

DEAR SIRS: We have advised you, to-night, of the purchase of cargo No. 1, and the chartering of a vessel. She is the Grenada, 14,500 bush. capacity; to load this week—to-morrow, if possible. When we commenced this cargo we fully expected to bulkhead, as we were
102 afraid No. 1 was not in sufficient quantity to enable us to make an entire load of that grade; but fortunately we were the only buyers, and it being plentier than we supposed, although really scarce, we have bought between 10 and 11,000 bush., costing 1.28½ and 1.29. A report has been received of a break in the Welland Canal which would take a week to repair. The captain of the Kate Kelly telegraphed here to get leave to transfer the cargo to the Welland Railway, but as her owner lives in Oswego, we told the agent to telegraph him to see you, as you were the best judge of the expediency of trans'hipment. We found, however, that a good many cargoes were being ordered tran'shipped, and we accordingly telegraphed you that it seemed to us doubtful whether anything would be gained by this operation, as the large business necessarily caused by the trans'hipment of several cargoes would probably occasion as much delay to *to* your cargo as it would experience by waiting until the canal was repaired and the vessel go through, although, as previously remarked, the captain telegraphed that a week would be necessary. Such men usually exaggerate, and we hope it will be repaired sooner.

Our market closed excited last night, and prices of No. 2, cash, ran up to 1.27; but to-day this figure is not sustained, as although the dispatches from N. Y. indicate a firm feeling, yet the very fair receipts to-day, (30,000,) with the prospect of much heavier shortly, and the fine weather, have depressed the market, and we close easier @ 1.25½ No. 2, cash, and 1.24⅛, seller September.

Yours, truly,
(Signed) W. P. MCLAREN & CO.
H.

Exhibit K. G. C., No. 21, A. B. G., (Bickford.)

OFFICE OF W. P. MCLAREN & CO.,
COMMISSION PRODUCE BUYERS,
Milwaukee, 13th Sept., 1869.

Messrs. A. F. SMITH & CO.

DEAR SIRS: Your favor of 8th inst. is rec'd and noted. We have just (5 p. m.) got the bills of lading of the Grenada, and will draw and send invoice Monday. Her cargo is very nice, and having a little mixture of old wheat will not harm it at all. The market opened strong, and went to 1.26¼ for cash, No. 2; but as N. Y. closed not quite so

strong, we fell back to 1.25 and 1.29, for 1 and 2. Rec'ts 38,000 bus.; will be better Monday, and pretty large next week, which affects prices. We will allow for the margins on the 20,000 options, in drawing for this cargo, although we will have to let most of the trades run for the present. It is not easy to get transactions closed up with the same parties, and profits and losses are seldom made up till the option expires. But we will make it as satisfactory as possible to you and your friends, and will write you fully on the subject next week, when we expect Mr. Davison back.

Yours, truly,

W'M P. McLAREN & CO.

Exhibit K. G. C., No. 22, A. B. G., (Bickford.)

OFFICE OF W'M P. McLAREN & CO.,
COMMISSION PRODUCE BUYERS,
Milwaukee, 11th Sept., 1869.

Messrs. A. F. SMITH & Co.

DEAR SIRS: We enclose invoice of cargo schooner Grenada, which sailed Sat'y, p. m., and have to advise our d'lts on you, as noted. The sample goes by express to-day, and we think will suit. It weighs 59½ full, and is choice wheat in every respect. Mr. Morison decided 103 not to ship any in this cargo, but will probably ship a full cargo soon. We also enclose acc'ts, purchase and sale, 40,000 bush. of wheat, and have allowed in sight paper on the cargo, for the present, of the $25,000 d'ft on you, for margins. In buying in or selling out options it is not often we can strike the same parties, so as to close the trade and get up margins, but we always try to do so, and have got yours so nearly closed that we have released the margins. The difference', however, are not collectable till the end of the month, and we can seldom get those then. If we should be able to get them anywhere near straightened out, before the end of the month, we will do so, and remit profits. The market opened strong, and the report of No. 2, being 10 p. m., Liverpool, when it was seen that N. Y. was barely sustained. Under the news we weakened, and closed quite dull at 1.27 ct. 7 & 1.24¼; No. 2, 1.18; No. 3, seller Sept'r, 1c. under cash; seller 1st half Oct'r, 1½ @ 2 cts. under cash; and seller on Oct'r, 2½ @ 3c. under cash. Receipts are 47,000 bush. to-day, and will be liberal this week. Our impression now is, that unless L'pool goes over 10, and shows very decided strength, we will see our market a little lower.

Yours truly,

(S'g'd) W'M P. McLAREN & CO.

Exhibit K. G. C., No. 23, A. B. G., (Bickford.)

[Office of A. F. Smith & Co., proprietors of the Corn Exchange Elevator, commission merchants for the sale of all kinds of State, Western, and Canada grain.]

OSWEGO, N. Y., *Sept.* 14, 1869.

Messrs. W. P. McLAREN & Co.,
Milwaukee, Wis.

GENTLEMEN: Your several favors, 8th, 9th, 10th, and 11th, rec'd, and contents fully noted. Your d'fts against Grenada cargo will have attention on receipt. We are entirely out of wheat, the Kelly not having put in an appearaace as yet. We look for her to-night some, but

may be disappointed again. Don't intend to be out of wheat again, if possible to avoid it; have no doubt your arrangement of the option trade will be satisfactory, though we supposed it might be settled up at any time by delivering the wheat. Our m'k't dull; not much wheat here. No. 2 nominally 1.43 @ 5; No. 1, 1.50.

Yours, truly,

(Copy.) A. F. SMITH & CO.

Exhibit K. G. C., No. 24, A. B. G., (Bickford.)

[Office of A. F. Smith & Co., proprietors of the Corn Exchange Elevator, commission merchants for the sale of all kinds of State, Western, and Canada grain.]

OSWEGO, N. Y., *Sept.* 15, 1869.

Messrs. W. P. McLAREN & Co.,
Milwaukee.

GENTLEMEN: We have your favor of 13th, and note contents. The ac. enclosed will have attention, as also d'fts, when they come in. Our friends are so much pleased with the result of their option trades that they are indnced to try again, and have instructed us to put in an order for 25,000 bush. No. 2, buyer Sept., at 1.20. It is possible they may get it should receipts increase largely; and, should they be unable to sell at a profit, their idea is to ship, and try the eastern m'k'ts. Should their limits be touched, therefore, within a reasonable time, please purchase the option for our ac. We explained to Mr. Davis, and here we would like the ac. made out, charging the full com., and crediting
104 us the rebate in ac. Other parties in your city and Chicago do this, and we presume you will see no objection. We have friends who we can sometimes induce to go in largely; but, as they are good customers in other ways, we charge them nothing for our services. The rebate is, therefore, all we make out of such transactions.

Yours, truly,

A. F. SMITH & CO.

Exhibit K. G. C., No. 25, A. B. G.

(Copy.)

Account purchase of 14,500 bus. wheat, b't for account and by order of Messrs. A. F. Smith & Co., Oswego, N. Y., through W. P. McLaren & Co.

A copy Ex. No. 8 McLaren is a copy of the invoice shipment by Grenada, (not here inserted for that reason.)

Exhibit K. G. C., No. 26, A. B. G., (Bickford.)
(Copy.)

$2,500.] MILWAUKEE, *Sept.* 3, 1869.

At sight, pay to the order of W. G. Fitch, cash'r, two thousand five hundred dollars, with exch'g' on N. Y., value received, and charge the same to account of

(Signed) W'M P. McLAREN & CO.

To Messrs. A. F. SMITH & Co.,
Oswego, N. Y.

(Endorsed.)
Pay to D. Mannering, esq., cashier, or order, for collection, account Nat'l Exchange Bank, Milwaukee.
(Signed) W. G. FITCH, *Cash.*

(Stamped:) City Bank, Oswego, paid.
[2-cent internal revenue-stamp, cancelled.]

Exhibit K. G. C., No. 27, A. B. G., (Bickford.)

(Copy.)

$1,232.24.] MILWAUKEE, *Sept.* 13, 1869.
At sight, pay to the order of W. G. Fitch, cash'r, twelve hundred and thirty-two $\frac{24}{100}$ dollars, with N. Y. exch., at Merchants' Bank, Watertown, N. Y., value received, and charge the same to the account of
(Signed) W'M P. McLAREN & CO.
To Messrs. A. F. SMITH & Co.,
Oswego, N. Y.
(Endorsed.)
Pay Merchants' Bank, Watertown, N. Y., or order, for collection, account of Nat'l Exchange Bank, Milwaukee.
(Signed) W. G. FITCH, *Cash'r.*
[2-cent internal revenue-stamp, cancelled.]

Exhibit K. G. C. No. 28, A. B. G., (Bickford.)

[Office of A. F. Smith & Co., proprietors of the Corn Exchange Elevator, commission merchants for the sale of all kinds of State, Western, and Canada grain.]

OSWEGO, N. Y., *Sept.* 22, 1869.

Messrs. W. P. McLAREN & Co.,
Milwaukee, Wis.

GENTS: Yours of the 20th at hand and noticed. Your draft will be proc'ted on presentation. By advice of owners of the option
105 wheat we have received, you close out option wheat, without loss to owners, if possible. They have been little sick about this purchase, and we regret now that they took it, as we fear they will be little shy about future operations this fall if they lose money on this. However, they can't always win. We feel considerably like taking another cargo No. 1 for our trade; and, if freights are no higher than 12 c., and you can draw as before, you may buy and ship another cargo. Draw through Merchants' Bank.
Yours, truly,
A. F. SMITH & CO.

Exhibit K. G. C., No. 29, A. B. G., (Bickford.)

OFFICE OF W. P. McLAREN & Co.,
COMMISSION PRODUCE BUYERS,
Milwaukee, 24 Sept., 1869.

Mess. A. F. SMITH & Co., *Oswego.*

DEAR SIRS: We wrote you this p. m., and since then have your favor 22d, which is fully noted. We hope yet to be able to get your

friends out safe on their option wheat; as there are so many fluctuations at present, it looks rather dark for doing so. Our banks are getting closer, daily, in money matters, but we have made arrangements to ship another cargo, as you wished us to do so on time, as before. Bottom seems to have been touched for the present, and as Chicago was a little firmer at the close, 5 p. m., we engaged the schooner Corsican now on her way from Racine, at 12c., and secured about half a cargo No. 1, at 1.18, the lowest point yet reached. We expect to have the cargo shipped to-morrow.

Yours, truly,
(Signed) W. P. McLAREN & CO.

Exhibit K. G. C, No. 30, A. B. G., (Bickford.)

(Blank No. 1.)

ATLANTIC & PACIFIC TELEGRAPH COMPANY.

Dated at Milwaukee, Sept. 24, 1869. Received at Oswego.
Addressed to A. F. SMITH & Co.

Reward Corsican about Parker Parrot seven thousand (7,000.) Afri ca Alcove finish purchase and load to-morrow. Paine seems stopped Closed firmer feeling.

W'M P. McLAREN & CO.

20 or 1.50 & 15 collect. Right.

Reward—we have chartered vessel.
Poker—14,000.
Parrot—we have bought.
Africa—No. 1 spring wheat.
Alcove—1.18.

This telegram has just been received at the office in Grant Block, 8.30 p. m., where any reply should be sent.

106 *Exhibit K. G. C. No. 31, A. B. G., (Bickford.)*

OFFICE OF W. P. McLAREN & Co.,
COMMISSION-PRODUCE BUYERS.
Milwaukee, 25th Sept., 1869.

(Private.)

Messrs. A. F. SMITH & Co.

DEAR SIRS: We wish to say a frank word to you in regard to time drafts. We do not say it egotistically, but only to state a fact, that our facilities for doing time paper are fully equal to any house here, and we are very glad to afford you all the benefit of it that we can. It has, however, been several times the subject of remark to us, by our bankers, that while we have been negotiating 30 & 45 d'yd paper for you, shorter date and direct on Oswego, (which b'ks always prefer,) has been, every now and then, brought in to them by other houses, who have not the same claim to the accommodation we have. Now we certainly should not say one word in regard to whom you see fit to employ as agents here, were it

not that your orders are coming in direct conflict with each other. For instance, at the time we offered our bank 30 & 45 d'y paper to-day, they are offered (by parties who do not keep acc't even with them,) 30 days' paper on you, direct Oswego. Of course our bank accommodates us first, but you can see the effect. The other parties offer the better paper, and will pay almost any price to get it done, while we desire to keep rates moderate, and do the best we can for you.

We trust you will appreciate our intentions in referring to this subject. We know, if you were here, we could show you very readily how it affects your interests. We take the opportunity to express our thanks to you for the orders you have favored us with, and the very pleasant relations that have existed between us, and which we trust may long remain. We trust, when your market settles so as to show any fair prices, we shall have some good consignments for you this fall. Some of our friends fully intend to ship your way. We regret very much your clients have an apparent loss in the 25,000 bus. now held here, but it may yet turn out better. If they prefer transferring to an October option, to shipping when the wheat comes in, will make the charges light.

The Corsican clears to-night, but too late to finish invoice till next mail.

Yours, truly,

(Signed) W. P. McLAREN & CO.

Exhibit K. G. C., No. 32, A. B. G., (Bickford.)

(Blank No. 1.)

THE WESTERN UNION TELEGRAPH COMPANY.

Dated Milwaukee, Sept. 25, 1869. Received at W. U., Oswego, 2.50 p. m.

To A. F. SMITH & Co.:

Parrot Balance Cargo Album nah Alcaae Shipping to-days legal laurel.

W'M P. McLAREN & CO.

10 collect $1.65.

n

Parrot, we have bought; Alcaae, 1.18; Album, 1.17½; Legal, market opened dull, but closed firm; Laurel, market held firm, from scarcity of wheat here.

107 *Exhibit K. G. C., No. 33, A. B. G., (Bickford.)*

[Office of A. F. Smith & Co., proprietors of the Corn Exchange Elevators, commission merchants for the sale of all kinds of State, Western, and Canada grain,]

OSWEGO, N. Y., *Sept.* 25, 1869.

Mess. W. P. McLAREN & Co.,
Milwaukee, Wis.

GENTS: Your several favors and telegrams are here and draft in, and paid, &c., &c., all of which we have not time to reply in detail, for the reason that our Mr. Bickford, who does the most of the corresponding, is away attending upon a sick father, and the writer has his hands

full to answer all letters and telegrams, do the selling and financiering and good deal of talking, as you are aware. All you have done is satisfactory, but you want us to do what we can't, viz: sell Kelly's wheat for $1.32 and 40; we tried hard to-day, but could not get an offer; in hopes Monday to be able to report sale at 1.32, or over; everything blue on account the N. Y. fandango yesterday.

Yours, truly,

A. F. SMITH & CO.

Exhibit K. G. C., No. 34, A. B. G., (Bickford.)

OFFICE OF W'M P. MCLAREN & CO.,
COMMISSION PRODUCE BUYERS,
Milwaukee, 26th Sept., 1869.

Messrs. A. F. SMITH & CO.

DEAR SIRS: Enclosed find invoice cargo Corsican, and we advise our draft on you to-day, as noted; the rate of ex. may look high, but the rate is bid up by others trying to get accommodation outside of their own banks. Mar. Insa. you will note is low, and we think the price of the wheat cannot be unprofitable; markets surely cannot go much lower; receipts will be affected even by present prices as soon as the first week is over, and we feel as if there must be something important deducted from the estimates of wheat-crop in Minno. and Iowa, as late rains are said to have done immense damage; altogether we feel pretty sanguine that bottom has been reached. We advised you to-day that we could sell out wheat for this month, and buy buyer all out at about the same price; thought your friends might wish to take advantage of this. The market ruled dull for all but spot No. 2, (which is exhausted by shipments,) but at the close stiffened, on the strength of closing New York reports showing active exports. We received this a. m. your telegram, saying could not get offer for Kelly wheat. Mr. Munson thinks it strange that this wheat should not have been sold, and with such reports as we have had (private and public) we find it difficult to explain to him. Enclosed market reports will give you the position.

Yours, truly,
(Signed) W'M. P. MCLAREN & CO.

Exhibit K. G. C., No. 35, A. B. G., (Bickford.)

[Office of A. F. Smith & Co., proprietors of the Corn Exchange Elevators, commission merchants for the sale of all kinds of State, Western, and Canada grain.]

OSWEGO, N. Y., *Sept.* 29, 1869.

Messrs. W. P. MCLAREN & CO.,
Milwaukee, Wis.

GENTLEMEN: We telegraphed you, charge the wheat to October option, this is by authority from owners; they don't seem inclined
108 to fetch it forward now, but later we think will take considerable; we are heartily sorry that they have this wheat, for think, was it not for it, could get them to take 100,000; they may go in again soon; they say, $1.05 for buyer, October, would induce them to take some; we have your favor of the 25th and 27th, both here to-day, the lat'er containing invoice of Corsican wheat, will examine it, and if find any errors, will report; the drafts will be duly honored; we sold the Kelly wheat to-day, dollar thirty, full price, and so telegraphed you, since been offered at $1.25, without buyers, but the New York muddle has upset every-

thing; as soon as they get straightened out, perhaps things may jog on again naturally; we fully appreciate your remark about drawing time, and you need not have any fears but that all you do for us is fully appreciated, and will be reciprocated; should any parties order us to buy wheat for them, living in the county, or what we take for local trade, we want through Watertown, but sometimes we get orders from here, or east of here, to take some; those lots we have drawn through bks here. We cannot appreciate the difference, whether your banks draw through banks here or Watertown; however, this is between us, and we shall hope to do very large business with you when things get settled; money very close here just now, and New York not yet certain where they are, but we think the most of them should be in States Prison; will make out account wheat soon delivered and paid for.

Yours, truly,

A. F. SMITH & CO.

Exhibit K. G. C., No. 36, A. B. G.

(Copy.)

Account purchase of 13,400 bus. wheat, bo't for account and by order of Messrs. A. F. Smith & Co., Oswego, N. Y., through W. P. McLaren & Co.

Ex. No. 9—McLaren, is a copy of the invoice shipment by Corsican, (not here inserted for that reason.)

The plaintiff's counsel next read from the deposition of Patrick McCanna, taken before U. S. Commissioner Getty, at Oswego, on the 11th day of May, 1870.

PATRICK MCCANNA, having been duly sworn, as aforesaid, did depose and say as follows, viz: I reside in Oswego, N. Y., more than 100 miles from New York City, and my age is 45 years, and my occupation, in Sept. and Oct. 1869, was outside man for A. F. Smith & Co., of Oswego.

Q. What were your duties as such outside man?

A. Getting vessels alongside the dock at the Corn Exchange Elevator, for the purpose of discharging cargoes into the elevator.

Q. What portion of the day was you usually on duty?

A. During all portions of the day, generally, when it was daylight. The elevator runs nights.

Q. Who took charge of the vessels which came alongside of the elevator during the night?

A. I generally did. I was generally on duty day and night as occasion required it.

Q. Whose business was it to get the vessels alongside of the warehouse, and ready for the delivery of the cargo into the warehouse, during said months of September and October, 1869?

A. I suppose it was mine.

Q. Did you keep a memorandum-book at that time, in which you entered the dates of the arrival of vessels, to discharge their cargoes into said warehouse, and the bin or bins into which the grain, or wheat, from vessels, was deposited in said warehouse?

109 A. Yes, sir.

Q. Were the entries in said memorandum-book made by you, at the date they purport to be made, and were they true at the time you made them?

A. Yes, sir; as far as I know.

Q. Have you that memorandum-book with you?

A. Yes, sir.

Q. Do you know of the arrival of the schooner Kate Kelly, at or about the 16th of Sept., 1869?

A. Yes, sir.

Q. Was the cargo of the Kate Kelly discharged into the Corn Exchange Elevator, at Oswego, on or about the 16th day of Sept., 1869?

A. It was.

Q. Into what bins in the said elevator was the said cargo of the Kate Kelly placed?

A. Nos. 28, 5, and 7.

Q. What amount of wheat was delivered from the said Kate Kelly into said bins 28, 5, and 7?

A. 7,996 bushels and forty-four pounds.

Q. Did any portion of the cargo of the Kate Kelly go into any other bins than Nos. 28, 5, and 7?

A. Yes, sir; into the middle team bin, north team bin, and south team bin.

Q. How much of said cargo went into the middle team bin, and how much into the south team bin, and how much into the north bin?

A. 360 bushels into the middle bin; 210 into south bin, and 360 into north bin.

Q. Did any portions of the said cargo go into any other bins?

A. No, sir.

Q. Was any other portion of the said cargo delivered into the warehouse which did not go into any numbered bins, or into any bins other than the receiving bins?

A. None, except the boat-load spouted.

Q. What do you mean by the term spouted?

A. I mean it is taken out of the vessel, weighed, and spouted into a canal-boat.

Q. How much was there spouted, and into what canal-boat?

A. 7,300 bushels, into boat Frank Alvord.

Q. Does that take the whole of the cargo?

A. Yes, sir.

Q. Were there two different kinds or qualities of grain on board of the Kate Kelly?

A. Yes, sir.

Q. Were the two different qualities separated, when on board the Kate Kelly?

A. Yes, sir; the receiving-book says so.

Q. Did you make a memorandum in your own private memorandum-book of the taking of any portion of the cargo of the Kate Kelly from a particular part of the vessel?

A. Yes, sir.

Q. State now what portion of the cargo of the Kate Kelly went into bin No. 28, from the after hatch?

A. 3,147 bushels 10 pounds, from the after hatch, went into bin 28.

Q. Was that all of the cargo of the Kate Kelly which was delivered from the after hatch of the vessel, and put into bin No. 28?

A. That was all from the after hatch.

Q. How much was put into bins 5 and 7?

A. 4,849 bushels 34 pounds.

Q. Where was that from?

A. The forward hatch.

Q. Was any portion of the wheat in bin 28 shipped out of said elevator on the 16th of September, 1869?

110 A. No, sir.

Q. Was any portion of the wheat in bin No. 28 shipped out of said elevator on the 18th of Sept., 1869?

A. Yes, sir.

Q. How much and to whom?

A. J. F. Allen, 100 bushels. The boat Four Sisters got the balance, 3,047 bushels and 10 pounds.

Q. Was that all of the cargo that was shipped on that day?

A. That is all I noted on this book.

Q. Was there any wheat shipped out of bins 5 and 7 on the 16th day of Sept., 1869; and, if so, to whom, and what amount?

A. On the 16th day of Sept., 4,849 bushels and 34 pounds were delivered out of the elevator, from the cargo Kate Kelly, and to boat Cayuga Chief, and the balance of the cargo of the Kate Kelly was put into the middle, south, and north bins and were shipped, as follows: 360 bushels to A. C. Thomas; to S. Graves & Co., 210 bushels; and to Penfield & Stowe, 360 bushels.

Q. Was, then, the cargo of the Kate Kelly disposed of as follows:

		Bushels.
Sept. 16,	spouted into canal-boat Frank Alvord, direct from the vessel	7,300
	A. C. Thomas	360
	S. Graves & Co	210
Sept. 16.	Penfield & Stowe	360
	Boat Cayuga Chief, from bins 5 and 7	4,849.34
Sept. 18.	To J. F. Allen, from bin 28	100
" "	To canal-boat Four Sisters, from bin No. 28	3,047.10

A. It was.

Q. So far as you know, was there any wheat in bins Nos. 28, 5, or 7 on the 16th of September, 1869?

A. I could not say.

Q. Could you say that there was any wheat in the bins Nos. 5, 7, and 28, at the time any of the cargo of the Kate Kelly was put into said bins 28, 5, and 7?

A. I could not say there was or was not.

Q. Do you know of the schooner Grenada delivering a cargo of wheat into the Corn Exchange Elevator, on or about the 25th day of September, 1869?

A. Yes, sir.

Q. Was all of the said cargo placed in bins in said elevator?

A. No, sir.

Q. Was any of said cargo spouted, and how much of it, and when?

A. On the 25th of September, 1869, 2,360 bushels were spouted into a canal-boat, and some into a team bin.

Q. Which bin, and what canal-boat, and how much in each?

A. 2,000 bushels into canal-boat Carribean, and 360 bushels into south team bin.

Q. Did any portion of said cargo go into any particular numbered bin in said warehouse, and, if so, into which bins?

A. The balance, after wheat was spouted, went into bins Nos. 25, 26, 4, and 6.

Q. At what date did the said cargo, or the portion thereof which went into bins, go into bins 25, 26, 4, and 6?

A. The 25th of September, 1869.

Q. Was any of the cargo which went into bin 25 shipped out of said bin, and when, and to whom?

A. I could not say; the cargo went into several bins.

111 Q. Was any portion of the cargo of the Grenada, which went into bins 25, 26, 4, and 6, or either of them, shipped on or about the 27th day of September into the boat B. Hagaman?

A. Yes, sir.

Q. How much of the said wheat, at or about the said date, went into the boat B. Hagaman?

A. 7,100 bushels.

Q. Where was the last shipment out of the warehouse, after the cargo of the Grenada was put into bins 25, 26, 4, and 6 from the said bins, prior to the 29th day of September, 1869?

A. Delivered on the 28th day of September, 1869, in connection with the cargo of the schooner Phalarope.

Q. When, or about when, was the cargo of the Phalarope, or any portion of it, put into either bin 25, 26, 4, or 6, and what quantity of the Phalarope's cargo was put into either bin 25, 26, 4 or 6?

A. The cargo of the Phalarope was put into bins 5, 6, 7, and 8, on the 21st of September. On the 21st of September a portion of the cargo went into bin No. 6.

Q. Is that all of the cargo of the Phalarope which went into bins that were numbered?

A. That is all it shows by the tally-book.

Q. Was any wheat shipped out of bins 5, 6, 7, and 8 before the 25th day of September, 1869, and how much?

A. Yes, sir; and about 13,080 bushels.

Q. How much of the cargo of the Phalarope, after said shipment, remained in either bins 5, 6, 7, or 8?

A. About 434 bushels.

Q. Was that all, up to the 25th September, 1869?

A. Yes, sir; about that.

Q. When was the 13,080 bushels shipped, and to whom?

A. Shipped September 21, 4,700 bush. on canal-boat Montana; on same date on boat J. W. Warren, 7,800 bush.; 22d September, to Hanchett & Delory, 360 bushels; and September 22d, 1869, 180 bushels to Hutchinson & Rogers.

Q. What was the total amount of the cargo of the Phalarope?

A. 16,274 bushels and 10 pounds.

Q. Where did the balance of the cargo of the Phalarope, not in bins, numbered 5, 6, 7, and 8, go out, when, and to whom?

A. To boat Montana; on the 27th day of Sept, 1869, were spouted 2,760 bushels into Montana.

Q. Making a total in the Montana of how much?

A. Of 7,500 bushels.

MAY 12TH, 1870.

Q. When, prior to the 27th of Sept., 1869, was the last shipment from bin 6?

A. The book shows the shipment of corn from bin 6, in connection with other bins, on Sept. 4th, 1869, from the cargo of the Fitzhugh.

Q. The last question repeated.

A. The last I see on the book is in connection with other bins of the cargo of the Delos De Wolf.

Q. Where was the shipment from bin No. 6, and the other bins of the cargo of the Delos DeWolf?

A. The first shipment I see on the book of the cargo of the De Wolf is 7,200 bushels, on June 8th, 1869. The next shipment is 7,740 bushels, June 8th, 1869.

Q. From June 8th, 1869, to Sept. 27th, 1869, did any wheat go into bin 6?

A. I don't find any wheat put into bin No. 6 since the cargo of the Delos De Wolf on my bin-book.

112 Q. Do you find on your bin-book, that after the cargo of the Delos De Wolf was shipped out of the elevator, corn was put into bin No. 6?

A. Yes, sir; on June 28th, 1869; in connection with other bins.

Q. Does it, then, appear from your bin-book that the cargo of the Phalarope was the first wheat put into bin No. 6, after June 8th, 1869?

A. I don't find any other wheat on my bin-book, put into bin No. 6, after June 8th, 1869.

Q. State whether or not the 434 bushels of the cargo of the Phalarope may not have been shipped out of the elevator prior to the delivery of any of the cargo of the Grenada?

A. The last of the Phalarope was shipped on the 8th of Oct., and the last of the Grenada was shipped on 28th of Sept., 1869, as appears by my bin-book.

Q. How much was shipped on the 8th of October, of the cargo of the Phalarope?

A. 16 bushels and 19 pounds by my bin-book.

Q. Is what you call your bin-book the memorandum-book kept by you, as testified in a former part of this deposition?

A. It is my memorandum-book, kept by me, as stated in my deposition, for my own convenience.

Q. Will you make out and attach to this, your deposition, a copy of the entries in said bin-book, in relation to the cargoes of the Kate Kelley, Grenada, and Phalarope?

A. This is my own private memorandum-book, kept by myself; I can give you what is on it now.

MAY 13, 1870.—Examination of witness McCANNA continued by Mr. Finch.

Q. Have you the copies of the entries in your bin-book of the said three cargoes, and will you produce them to the commissioner?

A. I have, and will, and here produce them; which copies are hereto annexed, and respectively marked, Exhibit P. McC., No. 1, (A. B. G.;) Exhibit P. McC., No. 1½, (A. B. G.;) P. McC., No. 2, (A. B. G.;) P. McC., No. 3, (A. B. G.) See page

Q. What do the letters and figures under the head "Date," on said exhibits produced by you, and marked as stated in the last answer, mean?

A. They mean the date of the discharge from the vessel into the elavator.

Q. What do the figures under the word "Bins," in said exhibits, mean?

A. It means the numbers of the bins into which the wheat was placed, according to my bin-book.

Q. What do the words under the heading "Name vessels," mean?

A. They mean the name of the vessel from which the cargo was discharged.

Q. What do the letters A. F. S. & Co. mean, under the words, whose ac.?

A. It is intended for the firm A. F. Smith & Co.

Q. What is the meaning of the word "wheat" under the word "kind?"

A. It is a description of cargo.

Q. What do the figures under the word "bush." mean?

A. The number of bushels.

Q. What do the figures under the letters "lbs." mean?

A. Pounds.

Q. What do the letters, words, and figures mean under the word "deductions, &c., &c.," in Exhibit P. McC., No. 1?

113 A. Name of boats and deliveries of cargoes, and also parties receiving that property, according to this exhibit.

Q. What do the words after hatch mean, following the words B't Frank Alvord, on said Exhibit No. 1?

A. It means wheat from the after hatch of the schooner Kate Kelly, loaded into the boat Frank Alvord.

Q. What do the words "middle bin," after the words A. C. Thomas, mean?

A. It means the middle bin on the east side of the elevator, and that 360 bushels of the cargo of the Kate Kelly went from that bin to A. C. Thomas, according to this exhibit.

Q. What do the words south bin, after the words S. Graves & Co., mean on said exhibit?

A. I meant the amount that went from the cargo Kate Kelly into that bin, for S. Graves & Co.

Q. What do the words north bin, on said exhibit, after the words Penfield & Stowe, mean?

A. It means north team bin, east side of the elevator, and that 360 bushels from the cargo of the Kate Kelly was delivered into that bin for Penfield & Stowe.

Q. What do the words Sept. 18th, on said exhibit, mean?

A. It means Sept. 18th.

Q. For what purpose was the said date, Sept. 18th, entered upon your bin-book?

A. To show the amount delivered on that date.

Q. Does it mean, then, the delivery, on the 18th day of Sept., 1869, of the wheat from the cargo of the Kate Kelly?

A. It means the delivery of that amount of the cargo of the Kate Kelly, on that date.

Q. What do the figures under the words "deductions," &c., 3,047.10, twice repeated, and the initials O. K. opposite the figures mean?

A. It means the discharge of the balance of the cargo, "all right."

Q. What do the words "after hatch," under the words whose ac. and the word "kind," on said exhibit, mean?

A. It means the "after hatch" of the Kate Kelly.

Q. Does the said exhibit, then, mean that the figures 3,147.10 and the figures "100," mean the quantity of wheat which went from the "after hatch" of the Kate Kelly into bin No. 28?

A. 3,147 bushels and ten pounds went into bin 28 from the "after hatch" of the cargo of the Kate Kelly; and the figures "100" mean deduction or delivery of cargo of that amount.

Q. Do, then, the figures 3,047.10, under the head "deductions, &c.," with the initials O. K. opposite said figures, simply mean the deduction of the figures "100" from figures 3,147.10?

A. They do; it means the amount carried forward, and then delivered.

Q. Did any portion of the wheat from the Kate Kelly, except 3,147 bushels and 10 pounds, go into any numbered bin?

A. I could not say whether there was or not.

Q. From the said Exhibit P. McC., No. 1, what portion of the cargo of Kate Kelly went into a numbered bin?

A. This exhibit shows that 3,147 bushels and 10 pounds went into bin number 28.

Q. Does it appear by Exhibit P. McC., No. 1½, (A. B. G.,) that any portion of the cargo of Kate Kelly went into bins numbered 5 and 7?

114 A. It appears from my bin-book that on Sept. 16, 1869, the Kate Kelly delivered to the Corn Exchange elevator, for account of A. F. Smith & Co., part of her cargo, on that date amounting to 4,849 bushels and 34 pounds, from forward hatch, in connection with the other part of her cargo, of same date.

Q. Does your bin-book show that that portion of the cargo of the Kate Kelly which went into bins 5 and 7 was at any time, and when, shipped from the elevator?

A. According to my bin-book, it was delivered on the same date of the receipt, Sept. 16, 1869.

Q. Do the letters "Sept.," and figures "16," under the heading "bush., lbs." in Exhibit P. McC., No. 1½, mean the date of the said delivery?

A. Yes, sir.

Q. Does your bin-book show the delivery of any wheat into the Corn Exchange elevator, in September, 1869, from the schooner Grenada?

A. Yes, sir; it shows wheat taken in for account of A. F. Smith & Co., from the Grenada.

Q. Into what bins was said cargo, or any portion of it, delivered?

A. Bins 25, 26, 4, and 6.

Q. Was any portion of said wheat spouted?

A. Yes, sir.

Q. What portion, and when?

A. By my bin-book it shows 2,000 bushels to the boat Carribean, and 360 bushels to team bin George Fraser.

Q. What portion of the said cargo was delivered into bins 25, 26, 4, and 6?

A. According to my bin-book, 12,142 bushels and 9 pounds.

Q. Was any portion of the cargo of the Grenada, which went into bins 25, 26, 4, and 6, delivered from the elevator, and when, and to whom?

A. My bin-book shows several deliveries, but not to whom.

Q. Give the deliveries in the order in which they appear on your bin-book.

A. Delivered:

Sept. 25, 1869		200	bush.
" " "		3,000	"
" 27, "		100	"
" " "		720	"
" " "		300	"
" " "		7,100	
" 28,		360	
" "		302	" 9 pounds.

Q. Does that amount, with the quantity which was spouted, make the total amount of the cargo of the Grenada?

A. Yes, sir; according to my bin-book.

Q. Was each particular shipment set down separately in your bin-book, and with the dates of the shipments written under it; that is, as to the wheat which was deposited in numbered bins?

A. The dates appear to be set under the delivery, on my bin-book.

Q. Does it so appear on the Exhibit P. McC., No. 2, (A. B. G.)?

A. It does.

Q. What do the figures 12,142.09, on the 7th line from the top of Exhibit P. McC., No. 2, represent?

A. They represent the amount of the cargo of the Grenada that went into store, into bins 25, 26, 4, and 6.

115 Q. What do the figures on the same line, 11,942.09, represent?

A. The balance in store in those bins after the delivery of the 200 bushels, indicated by the figures 200 upon the next line, over the words and figures Sept. 25.

Q. What do the figures 8,942.09, on said line 7, represent?

A. It represents the balance in store in those bins after the deduction or delivery of the 3,000 bushels, Sept. 25, indicated by the figures 3,000 upon the next line, over the words and figures Sept. 25.

Q. What do the figures 8,842.00, on said 7th line, represent?

A. It represents the balance in store in those bins after the delivery of 100 bushels, Sept. 27, indicated by the figures "100," upon the next line, over the words and figures Sept. 27.

Q. What do the figures 8,122.09, on the 10th line of said exhibit, represent?

A. It represents the balance in store in those bins, after the delivery of the 720 bushels, on the 27th day of Sept.; indicated by the figures 720 upon the 8th line of said exhibit, over the words and figures Sept. 27.

Q. What do the figures 7,762.09, on said 10th line, represent?

A. It represents the balance in store in those bins, after the delivery of 360 bushels, on the 27th of Sept., indicated by the figures 360 on the 11th line of said exhibit, over the words and figures Sept. 27.

Q. What do the figures 662.09, on said 10th line, represent?

A. It represents the balance in store in those bins, after the delivery of the 7,100 bushels, on the 27th of Sept., indicated by the figures 7,100 on the 11th line of said exhibit, over the words and figures Sept. 27.

Q. What do the figures 302.09 on line 13, of said exhibit, represent?

A. It represents the balance in store in those bins, after the delivery of 360 bushels, on the 28th of Sept., indicated by the figures 360, upon the 11th line of said exhibit, over the words and figures "Sept. 28."

Q. What do the figures 302.09, on line 14 of said exhibit, represent?

A. It represents the delivery of the balance of that cargo on the 28th of Sept., 1869.

Q. What do the figures 13,514.10, on the 6th line of Exhibit P. McC., No. 3, represent?

A. It represents the amount of the cargo of the Phalarope, that went into bins 5, 6, 7, and 8, in the Corn Exchange elevator, for account of A. F. Smith & Co., by my bin-book.

Q. Was the manner of keeping your bin-books the same, in all cases, as described by you in your testimony as to Exhibit P. McC., No. 2?

A. Yes, sir; the same system.

Q. Do the several quantities represented by figures, on said Exhibit P. McC., No. 3, on bins 6 and 9, after the figures 13,514.10, indicate the several numbers of bushels of said cargo remaining in bins 5, 6, 7, and 8, after deducting the several deliveries from those bins?

A. Yes, sir; they are so intended to represent by my bin-book.

Q. Do the figures on the 7th and 10th ruled lines, from top of said Exhibit P. McC., No. 3, to the right of the column headed bins, represent the amount of each shipment from said bins, written over the date thereof, respectively?

A. Yes; excepting that the words and figures on line 7, "add 100," which means that 100 was shipped and taken back, and leaving 1,074.10 in store in those bins as represented by those figures on line 9, on said Exhibit P. McC., No. 3.

Q. Do the several dates written on ruled lines 8 and 11 on Exhibit P. McC., No. 3, represent the time of the several shipments from the said bin of the quantity of wheat indicated by the figures written over those dates?

A. I suppose so, according to my bin-book.

Q. Can you state when, prior to Sept. 25, 1869, the last shipment of wheat took place from the Corn Exchange elevator, from bins 25, 26, 4 or 6, or either of them?

A. There was some delivered from the Camanche, Sept. 24, 1869.

Q. From what bins, and how much?

A. From bins 2, 4, 26, 28, and 32; 1,700 bushels on the 24th, and 6,987 bushels on the 24th.

Q. What was the total amount of the cargo of the Camanche?

A. According to my book, 17,494 bushels, 39 pounds.

Q. Was any portion of the cargo of the Camanche delivered prior to the 24th Sept., 1869?

A. Yes, sir.

Q. How much?

A. About 8,800 bushels.

Q. How much was left of the cargo of the Camanche on the 25th of Sept., 1869, in the warehouse?

A. 7 bushels and 39 pounds, according to my bin-book.

Q. How much, or about how much, would each of the said bins 6, 7, 25, and 32 hold if fully filled?

A. Between 4,200 and 4,500 bushels.

Q. According to the usual course of business at the elevator, would or not No. 1 Milwaukee spring-wheat be put into the same bin with No. 2 Milwaukee spring-wheat?

A. No, sir; not if I knew it.

Q. From what vessel was the wheat taken which went into bin No. 32 on the 3d day of October, 1869?

A. From schooner Atmosphere, for account of A. F. Smith & Co.

Q. Was any wheat put into bin No. 32 from the 3d day of October, 1869, until after the 8th day of October, 1869, except that which came from the schooner Atmosphere?

A. My bin-book does not show any, except from the Atmosphere.

Q. Do you know of the arrival of the schooner Atmosphere at the Corn Exchange elevator in Oswego on or about the 3d of October, 1869?

A. Yes, sir; according to my bin-book.

Q. Did you make an entry in your bin-book and also in the receiving-book of the Corn Exchange elevator of the discharge of the Atmosphere?

A. Yes, sir; I did.

Q. Are the said entries in your bin-book and in the tally-book of the Corn Exchange elevator, in relation to the discharge of said cargo, in

your handwriting, made by you at or about the date they purport to be made?

A. Yes, sir.

Q. Are you able, without the said entries, to state the date of the discharge of the said cargo, and where or into what bins the cargo of said vessel was placed?

A. I could not state without the use of the bin-book, or to the entries in the tally-book made by me.

Q. Was any portion of the cargo of the said vessel spouted?

A. No, sir; not by my bin-book.

Q. Did any and what amount of the said cargo go into numbered bins in the said Corn Exchange elevator?

A. The cargo went into bins, 8, 10, 32, and 30, 14,850 bushels and 47 pounds, on the 3d day of October, 1869.

117 Q. Was any of the said cargo discharged from the said elevator, and when, and to whom, and in what amounts?

A. There was discharged from the Atmosphere as follows:

Oct. 5, 1869, to canal-boat Harm & Post, 4,365 bush. and 33 pounds of cargo of Atmosphere.

Oct. 5, 1869, to canal-boat E. D. Case, 7,660 bush.

Oct. 8, 1869, to the canal-boat Anna Rebecca, 2,825 bushels and 14 pounds, the balance of the cargo of the Atmosphere.

This last amount was delivered in connection with 16 bushels 19 pounds of the cargo of the Phalarope, and 7 bushels 39 pounds of the cargo of the Camanche, and 4,350 bushels and 45 pounds of the cargo of the Corsican; all of which is meant to be 7,200 bushels on the Anna Rebecca.

Q. Do these shipments show the disposition of the entire cargo of the Atmosphere?

A. Yes, sir; according to my bin-book.

Q. When was the cargo of the Camanche received into the Corn Exchange elevator, and was any, and what, portion of said cargo placed into numbered bins?

A. It was discharged Sept. 20, 1869, into the Corn Exchange elevator, for account of A. F. Smith & Co., and was all put into numbered bins 2, 4, 26, 28, and 32, 17,494 bushels and 39 pounds.

Q. What amount of the said cargo of the Camanche remained in bins on and after October 3d, 1869, until October 8th, 1869?

A. 7 bushels and 39 pounds.

Q. When was the last delivery from the elevator of the cargo of the Camanche prior to October 8th, 1869?

A. September 24, 1869.

Q. Between the date of the receipt of the cargo of the Camanche into the elevator, and the 3d of October, 1869, had any, and what amount, (if any,) wheat been put into bins 4 or 32, or either of them?

A. On the 25th Sept. part of the cargo of the Grenada was put into bin 4; the 29th of Sept., 1869, part of the cargo of the Victoria was put into bin No. 4; and on the 1st Oct., 1869, part of the cargo of the Gerrit Smith was put into bin No. 32; and Oct. 2d, 1869, part of the cargo of the schooner Thomas Parsons was put into bin No. 4.

Q. Are those all of the cargoes, or parts of cargoes, which went into bins 4 or 32, or either of them, between Sept. 20, 1869, and Oct. 3d, 1869?

A. They are; including the cargo of the Camanche, which I have before mentioned.

Q. When was the last delivery from the elevator of the cargo of the Victoria, and into what boat, and what amount?

A. Oct. 2d, 1869. It was delivered to the canal-boat John H. Drake; 5,760 bushels.

Q. Into what other bin or bins, besides bin 4, did the cargo of the Victoria go?

A. Bin 26.

Q. What was the whole amount of the cargo of the Victoria, which went into numbered bins?

A. 5,760 bushels.

Q. Was the cargo of the Victoria, deposited in bins 4 and 26, for the account of A. F. Smith & Co.?

A. The cargo of the Victoria was deposited into bins for account O. E. Shepard.

Q. And it was delivered out for his account?

A. I suppose it was. The entry in the delivery-tally so shows it, and is in my handwriting.

118 Q. Have you now with you a copy of the entries in your bin-book in relation to the receiving and delivering of the cargo of the schooner Atmosphere into and from the Corn Exchange elevator in Oswego, from the 3d to the 8th day of Oct., 1869, inclusive?

A. I have, and here produce it.

Q. Is the paper now shown you, marked P. McC., No. 6, (A. B. G.,) hereto annexed, a copy of the said entries in your said bin-book?

A. It is.

Q. What do the figures 8, 18, 32, and 30, under the heading bins, in said Exhibit P. McC., No. 6, mean?

A. The number of the bins into which the grain was placed.

Q. What do the figures 14,850.47, under the heading "Bush., lbs.," mean?

A. It means the total number of bushels of the cargo of the schooner Atmosphere taken into store at the Corn Exchange elevator.

Q. What do the figures 10,485.14, and the figures "2,825.14," under the heading "deductions, &c., &c.," mean?

A. The first of said figures, 10,485.14, is the amount of the said cargo remaining in store after the delivery of the 4,365 bushels and 33 pounds, indicated by the figures 4,365.33 over the words and figures Oct. 5th; and the second of said figures, "2,825.14," is the amount of said cargo remaining in store after the delivery of the 7,660 bushels indicated by the figures "7,660," over the word and figures "Oct. 5th."

Q. What do the figures "4,365.33," "7,660," and "2,825.14," over the word and figures "Oct. 5th," and the word and figure "Oct. 8th," mean?

A. They mean the several deliveries of the cargo of the schooner Atmosphere over the several dates of such deliveries, according to my bin-book.

Q. What do the words and figures Oct. 5th and Oct. 8th mean?

A. The date of the above deliveries respectively.

MAY 16, 1870.—Q. Do you know of the cargo of the schooner Corsican being received into the Corn Exchange elevator, in Oswego, on or about the 8th day of Oct., 1869?

A. I do, according to my bin-book.

Q. Did you make an entry in the usual course of your business, in the receiving tally-book of the Corn Exchange elevator, of the receipt of the cargo of the said schooner Corsican; if yea, what is the entry on said tally-book of said receipt which was made by you?

A. I did, and it is as follows: Schooner Corsican, Oct. 8th, 1869, "Ac. A. F. Smith & Co., wheat-bins." That is all in my handwriting.

Q. Did you also make an entry in your bin-book of the time and name of vessel, &c.?

A. I did make an entry of the time and name of vessel, &c.

Q. What amount of wheat of the cargo of the Corsican went into said elevator?

A. According to my bin-book, 13,358 bushels and five pounds.

Q. Was any, and what, amount of said cargo spouted?

A. There were 7,056 bushels, into the canal-boat George Ames.

Q. On what day was that spouted?

A. It appears, from my bin-book, on the same date the cargo was discharged into the elevator, October 8, 1869.

119 Q. Was any other, and what, portion of said cargo delivered into the canal-boat Geo. Ames on said date?

A. There were 780 bushels delivered to the Geo. Ames from store of this cargo, in addition to the 7,056 bushels, making a total of 7,836 bushels, which went into the canal-boat George Ames of said cargo.

Q. Did any, and what, amount of the said cargo of the said schooner Corsican go into numbered bins in said elevator on the said 8th day of October, 1869?

A. There did, 6,302 bushels and five pounds into bins numbers 3, 4, 25, and 26, according to my bin-book.

Q. Does that also appear on the receiving tally-book?

A. It does; into the same four bins.

Q. When, and to whom, or what canal-boat, if any, was the cargo of the Corsican, which went into said bins 3, 4, 25, and 26, delivered, and what amount?

A. It was delivered as follows, as appears by the delivery tally-book in connection with my bin-book: Oct. 8, 1869, to the canal-boat Anna Rebecca, 4,350 bushels and 48 pounds; Oct. 16, 1869, to Slayton & Slawson, 124 bushels and 32 pounds, upon order of Randall & Kenyon; Nov. 6, 1869, 650 bushels and 50 pounds to the canal-boat Maid of Judea; Nov. 11, 1869, 27 bushels to Mr. L. H. Mills, upon the order of Randall & Kenyon; Nov. 11, 1869, 360 bushels to L. H. Mills, upon the order of Randall & Kenyon; Dec. 17, 1869, 8 bushels 55 pounds, middle-team bin, to be weighed for D. B. Hanchett. This seems to be the delivery of that cargo, according to my bin-book, after the deliveries into the canal-boat George Ames.

Q. Did you make an entry in the delivery tally-books of the several deliveries of the cargo of the Corsican?

A. I did.

Q. Were the said entries made at the date they purport to have been made, and in the usual course of your business?

A. They were.

Q. Are you able without said entries to testify to the details of the delivery of the cargo of the Corsican?

A. I am not.

Q. At the time you made the entries in the tally-books, did you then know the facts stated in said entries, which you made entries of, except for whose account the wheat was?

A. Yes, sir.

Exhibit P. McC., No. 1, A. B. G.

CORN EXCHANGE ELEVATOR, 1869.

Date.	Bins.	Name of vessels.	Whose account.	Kind.	Bush.	Lbs.	Deductions, &c., &c.
Sept. 16	.....	Kate Kelly	A. F. S. & Co.	Wheat	7,300	.....	Bt. Frank Alvord, after-hatch.
"	.....	"	"	"	360	.....	A. C. Thomas, middle bin.
"	.....	"	"	"	210	.....	S. Graves & Co., south bin.
"	.....	"	"	"	360	.....	Penfield & Stone, north bin.
"	28	"	"	After-hatch..	3,147	10	3,047.10 } O. K.
"	.....	.....	.....	.....	100	.....	3,047.10 } Sept. 18th.

Exhibit P. McC., No. 1½, A. B. G.

CORN EXCHANGE ELEVATOR, 1869.

Date.	Bins.	Name of vessels.	Whose account.	Kind.	Bush.	Lbs.	Deductions, &c., &c.
Sept. 16.	5, 7	Kate Kelly	A. F. S. & Co.	Wheat	4,849	34	From forward-hatch.
					4,849	34	Weighed from vessel by Maxon, Sept. 16th, and weighed to b't by Bough. They agree in their weighing. O. K.

120 *Exhibit P. McC., No. 2, A. B. G.*

CORN EXCHANGE ELEVATOR, 1869.

Date.	Bins.	Name of vessels.	Whose account.	Kind.	Bush.	Lbs.	Deductions, &c., &c.
Sept. 25.	.....	Grenada...	A. F. S. & Co.	Wheat	2,000	.....	B't Carribean.
"	.....	"	"	"	360	.....	Team bin, Geo. Frazier:
"	25,26, 4, 6	"	"	"	12,142	09	11,942.09, 8,942.09, 8,842.09.
					200		3,000, 100, 720.
					Sept. 25,		Sept. 25, Sept. 27, Sept. 27.
							8,122.09, 7,762.09, 662.09.
							360, 7,100, 360.
							Sept. 27, Sept. 27, Sept. 28.
							302.09.
							302.09.
							Sept. 28.

Exhibit P. McC., No. 3, A. B. G.

CORN EXCHANGE ELEVATOR, 1869.

Date.	Bins.	Name vessels.	Whose account.	Kind.	Bush.	Lbs.	Deductions, &c., &c.
Sept. 21st.	.....	Phalarope.	A. F. S. & Co.	Wheat	2,760	.....	B't Montana.
"	5, 6	"	"	"	13,574	10	8,774.10, 974.10.
	7, 8	.....	.....	.....	4,740	.....	7,800 av'd 100.
		.....	.....	.....	Sep. 21st	.....	Sept. 21st.
		Forward..	1,074. 10	714 10	534	10	174.10, 116.19, 16.19.
			360	180	360	.....	57.57, 100, 16.19.
			Sept. 22d.....	Sept. 22d....	Sept. 27	.....	Sept. 28, Oct. 8.

Said plaintiff also read the deposition of Charles Bough, weighman at the Corn Exchange elevator in September and October, 1869, as follows:

CHARLES BOUGH, having been duly sworn as aforesaid, did depose and say as follows, viz:

I reside in the city of Oswego, more than 100 miles from the city of New York. I am twenty-five years of age and upwards.

Q. What was your occupation in the months of Oct. and Sept., 1869?

A. I was weighman in the Corn Exchange elevator, in Oswego, from about August, 1868, until Oct. 27, 1869.

Q. What were your duties as such weighman?

A. I first had to fix the slides in the different spouts, so as the grain would lead from the weigh-hopper to wherever it was going to be put, then balance the scales, and if the mate or captain of the schooner was up in the weigh-room, I proceeded to weigh according to the order on the tally-book. When I weighed I kept tally, in the tally-books, of the different drafts and parts of drafts that I weighed.

Q. Were such tallies entered on the receiving tally-books of the Corn Exchange elevator at the time of the weighing of each draft?

A. They were.

Q. How much wheat was generally weighed in one draft?

A. 60 bushels was the ordinary draft; the hopper was a 60-bushel hopper.

Q. Do the figures "60," in lead-pencil, on the receiving tally-book, indicate the several drafts weighed from the vessel mentioned in the heading over said figures?

A. Yes, sir.

Q. Who entered in the receiving tally-book the number of the bins into which the cargo of the vessel named in the heading over the said tally-figures was received?

121 A. Generally, when I weighed, I entered the number of the bins in the receiving tally-book.

Q. How did you know the numbers of the bins into which the cargoes of the vessels were received?

A. I received my information from the machinery-man generally, and I generally entered the numbers of the bins on the receiving tally-book at the time, as the machinery-man gave them to me.

Q. Did you, as weighman, and when on duty, also keep tallies of the discharge from the elevator of the cargoes which had been received into the elevator?

A. I did.

Q. Were said tallies of the discharge of the cargo from the elevator kept in figures written by a lead-pencil, and under the heading generally written in ink, in the delivery tally-book?

A. Yes, sir.

Q. Were said tallies made by you when on duty at the time each draft was weighed?

A. They were meant to be and they were so far as I know.

Q. Was there a shelf or desk in the weigh-room for the tally-books near the weigh-hopper?

A. There were two desks in the weigh-room for that purpose, one for each weigh-hopper, and two weigh-hoppers in the weigh-room.

Q. Were the tally-books in the weigh-room during the time a cargo was weighed in or weighed out?

A. When we were receiving, the receiving one was there, and when we were delivering, the delivering one was there.

Q. Look upon the paper now shown you, marked Exhibit No. 27, (A. B. G.,) attached to the deposition of Sidney Bickford, and state if it represents correctly the manner of the entries on the receiving tally-book, and the tallies, as kept on said tally-book, of the cargo of the Kate Kelly?

A. I think it does.

Q. Are the words and figures "Schooner Kate Kelly, into boat Frank Alvord, Sept. 16, '69, ⅜ A. F. S. & Co., wheat, after-hatch," the heading in said receiving tally-book of the cargo of the Kate Kelly, and do the figures under said heading represent the tallies of the receipt of said cargo?

A. I think it is the heading, and the figures represent the tallies.

Q. Who prepares the heading in the receiving tally-book for the weighman?

A. Generally the foreman, Mr. Patrick McCanna.

Q. Is that heading prepared for the weighman and the tally-book delivered to the weighman before he commences to weigh any portion of the cargo?

A. Yes, sir, as a general thing; sometimes it is headed by the weighman, by the direction of the foreman; sometimes it might be by parties in the office, when McCanna was absent.

Q. Did you weigh into the elevator any portion of the cargo of the Kate Kelly?

A. I did not.

Q. Did you weigh out any of the cargo of the Kate Kelly?

A. It appears by the figures on the delivery tally-book that I did.

Q. What is the heading in the delivery tally-book under which you kept the tallies of that portion of the cargo of the Kate Kelly weighed out by you?

A. "Deliver boat Cayuga Chief, order A. F. S. & Co., wheat, ex Kate Kelly, forward-hatch, 4,849.34, Sept. 16, '69."

122 Q. In whose handwriting is that heading?

A. In the handwriting of Mr. McCanna, I think.

Q. Did you make all the tally-figures under said heading?

A. I think I did.

Q. What amount did you weigh out of the said cargo?

A. According to the figures in the tally-book, I weighed out 4,849 bushels and 34 pounds.

Q. Did you weigh out any other portion of the cargo of the Kate Kelly; and, if so, when, and what amount, and to whom?

A. On examination of the tally-book, I don't see that I weighed out any other portion of the cargo of the Kate Kelly, received Sept. 16, 1869.

Q. Do you know of the schooner Grenada discharging her cargo into the Corn Exchange elevator, Sept. 25th, 1869?

A. I don't know except from the entry upon the receiving tally-book and it appears from such book that there was a cargo received on that date.

Q. What is the heading in said tally-book of the reeeipt of said cargo?

A. "Schooner Grenada, Sept. 25, '69, ac. A. F. S. & Co., wheat-bins."

Q. In whose handwriting is said entry?

A. In the handwriting of Mr. McCanna, I think.

Q. Is there any entry in said tally-book after the word "bins," and what is the entry?

A. The first thing after the words "bins" are the figures 25, 26, 4, and 6,

Q. What do the figures 25, 26, 4, and 6, after said word "bins," mean?

A. They designate the numbers of the several bins said cargo of wheat was run into in the Corn Exchange elevator, as given to the weighman by the machinery-man.

Q. In whose handwriting are the said figures 25, 26, 4, and 6?

A. I think they are in my handwriting.

Q. Did you enter the said figures on the said tally-book at the date of the receipt of the said cargo?

A. I think I did; we generally did.

Q. Were the said figures 25, 26, 4, and 6, made by you in the usual course of business, and for the purpose of keeping an accurate memorandum of the bins into which said cargo of the Grenada was deposited?

A. Yes, sir; I so intended it to be.

Q. From whom or how did you get the numbers 25, 26, 4, and 6 as the bins into which the cargo of the Grenada was to be deposited and was deposited?

A. From the machinery-man,

Q. In the usual and ordinary course of business are said numbers given by the machinery-man to the weighman, and by the weighman entered in the tally-book before the cargo is weighed and put into bins?

A. Yes, sir; they are given to the weighman some time during the unloading of the vessel, as a general thing, and before the book is returned to the foreman.

Q. Do the tallies of the receipt of the cargo of the Grenada appear under the heading and numbers 25, 26, 4, and 6?

A. A part of said tallies of said cargo do appear under said heading and figures.

Q. Are the said tallies which so appear in your own figures, and were they or not entered by you on said tally-book in the order in which they appear, and on the 25th day of Sept., 1869.

123 A. It appears by the book that all of the tallies of that cargo, except the first 24 drafts, were made by me on said tally-book in the order in which they appear, and I think they were made on the 25th day of Sept., 1869. I have no way of knowing except by looking at the book.

Q. Were said tallies made by you in the usual and ordinary course of business, and were they correct at the time you made them?

A. They were, and were correct so far as I know anything about it.

Q. Did you weigh out any portion of the cargo of the Grenada, and when, and how much, and in what amounts?

A. I did. On the 25th of Sept., 1869, 360 bushels to south bin; also, on the 25th of Sept., 1869, to the canal-boat Carribean, 2,000 bushels; Sept. 25, 200 bushels to the schooner Trader; Sept. 25th, 1869, to canal-boat Cayuga Chief, 1,020 bushels; Sept. 27th, 1869, 720 bushels to middle bin; Sept. 27th, 1869, to canal-boat B. Hagaman, 2,520 bushels; Sept. 27, 1869, 360 bushels to north bin. I think that is all I weighed out from that cargo, as appears from the tally-books now in my hands.

Q. What is the heading in the tally-book of the delivery of the 360 bushels to south bin, Sept. 25, 1869?

A. "Schooner Grenada, Sept. 25. '69, ac. A. F. S. & Co., team-bin for George Frazier, 360 bush. wheat," and the tallies follow that entry; team is known also as south bin.

Q. What is the heading in the tally-book of the delivery of the 2,000 bushels in the canal-boat Carribean, Sept. 25th, 1869?

A. It is in my handwriting, and is as follows: "Schooner Grenada, Sept. 25, 1869, a/c A. F. S. & Co., wheat into boat Carribean, 2,000 bush.," and the tallies of that delivery follow that heading.

Q. What is the heading in the tally-book of the delivery of the 200 bushels to the schooner Trader, September 25, 1869?

A. It is in the handwriting of Mr. McCanna, and is as follows: "Deliver schooner Trader, Sept. 25, '69, order A. F. S. & Co., 200 bush. wheat, ex Grenada," and the tallies of that delivery follow that heading.

Q. What is the heading in the tally-book of the delivery of the 1,020 bushels into the canal-boat Cayuga Chief, Sept. 25, 1869?

A. It is in the handwriting of Mr. McCanna, I think, and is as follows: "Deliver boat Cayuga Chief, Sept. 25, '69, order A. F. S. & Co., wheat, ex Grenada, 3,000 bush.," and the tallies which I made of that delivery follow that heading. At the time of the delivery of the 3,000 bushels we were weighing with both hoppers, and each weighman had his own tally-book, and it appears by the other tally-book that the balance of the 3,000 bushels was weighed out by the other weighman.

Q. What is the heading in the tally-book of the delivery of the 720 bushels to middle bin, Sept. 27, 1869?

A. I think the heading is in the handwriting of Mr. McCanna, and is as follows: "Deliver J. C. Wright bush. wheat, ex Grenada, order A. F. S. & Co., Sept. 27, '69, 720 bush.," and the tallies of that delivery follow that heading.

Q. What is the heading in the tally-book of the delivery of the 2,520 bushels into canal-boat B. Hagaman, Sept. 27, 1869?

A. It is in the handwriting of Mr. McCanna, I think, and reads as follows: "Deliver boat B. Hagaman, Sept. 27, '69, order A. F. S. & Co., wheat, ex Grenada, bins 25, 26, 4, and 6," and the tallies of that delivery follow that heading.

124 Q. What is the heading in the tally-book of the delivery of the 360 bushels into north bin, Sept. 27, 1869?

A. It is in the handwriting of Mr. McCanna, I think, and reads as follows: "Deliver Pool & Clark, Sept. 27, '69, order A. F. S. & Co., 360 bush. wh't, ex Grenada." The tallies of that delivery follow that heading.

Q. Do the numbers of the bins appear on the said tally-book under these said tallies; and, if so, what numbers so appear?

A. They do not appear at all; but the tally-book shows that this delivery went to north team-bin, and that it is in my handwriting, and, I think, written at the time.

Q. Do you know the schooner Atmosphere discharging her cargo of wheat into the Corn Exchange elevator, October 3, 1869?

A. I have no recollection except from the receiving tally-book of the Corn Exchange elevator now in my hands.

Q. Did you weigh in any portion of the cargo of wheat which purported to be the cargo of the schooner Atmosphere, on or about October 3, 1869?

A. I did.

Q. Have you the receiving tally-book of the Corn Exchange elevator now in your hand; and, if so, is there a heading in the said tally-book of the receipt of the cargo of the schooner Atmosphere at or about said date?

A. I have; and there is a heading in the said receiving tally-book which reads as follows: "Schr. Atmosphere, Oct. 3, 1869, a/c. A. F. S. & Co., wheat-bins."

Q. In whose handwriting is the heading?

A. I think the handwriting is Patrick McCanna's.

Q. Do any figures follow the words "bins;" and, if so, what are they?

A. Yes, there are; and they are as follows: 8, 10, 32, 30.

Q. In whose handwriting are the figures 8, 10, 32, 30?

A. They are not mine; can't swear whose they are.

Q. Are there any tallies under the said heading and under said figures 8, 10, 32, 30, of the said cargo, and are any of the said tallies in your handwriting?

A. There are; and part of them are in my handwriting.

Q. Did you weigh that portion of the cargo of the Atmosphere the tallies of which are in your handwriting?

A. Yes, sir; I weighed 10,290 bushels and 47 pounds.

Q. Were the tally entries made by you of the said cargo made at the time they purport to be made?

A. Yes, sir; I think they were.

Q. For what purpose were they made by you?

A. I suppose they were made by me to keep track of the grain I weighed, the amount of grain and from what vessel. I have given the total amount of the cargo which I weighed in.

Q. Did you weigh out any portion of the cargo of the Atmosphere, and when, what amount, and into what canal-boat or boats?

A. Yes, sir; I weighed 3,000 bushels into canal-boat E. D. Case, Oct. 5, 1869; and also weighed out, Oct. 5, 1869, 2,220 bushels into canal-boat Harm & Post, from cargoes of the Atmosphere and Parsons; also weighed 3,300 bushels into boat Anna Rebecca, Oct. 8, 1869, from the cargoes of the Atmosphere, Phalarope, Cama'che, and Corsican.

Q. What is the heading in the delivery tally-book weighed by you which went into the canal-boat E. D. Case?

A. It reads as follows: "Deliver boat E. D. Case, Oct. 5, '69, order A. F. S. & Co., wheat, ex Atmosphere."

Q. Are all the delivery tallies under that heading in your handwriting?

A. They are; and I think were made by me at the time they bear date.

125 Q. What is the heading in the delivery tally-book of the 2,220 bushels weighed by you that went into the canal-boat Harm & Post, Oct. 5, 1869?

A. It is as follows: "Deliver boat Harm and Post, 5, '69, order A. F. S. & Co., wheat, ex Parsons and Atmosphere."

Q. Are all the delivery tallies under that heading in your handwriting and made by you at the time they bear date?

A. They are in my handwriting, and made by me at the time they bear date.

Q. What is the heading in the delivery tally-book of the 3,300 bushels weighed out by you which went into the canal-boat Anna Rebecca, on Oct. 8, 1869?

A. "Deliver Anna Rebecca, Oct. 8, '69, order A. F. S. & Co., wheat, ex Atmosphere, Phalarope, Camanche, and Corsican."

Q. Were all the delivery tallies, under said heading, in your handwriting made by you at the date mentioned in said heading?

A. A portion of them was made by me, and a portion by some one else. The tallies for the 3,300 bushels were made by me, and I presume were made by me at the time.

Q. Were each and all of the said delivery tally entries made by you in the usual and ordinary course of business?

A. I think they were, sir.

Q. Do you know of the schooner Corsican discharging her cargo of wheat into the Corn Exchange elevator in Oswego, on or about the 8th day of October, 1869?

A. I do not know. I did not weigh any of her cargo into store.

Q. Did you weigh out any of the cargo of the Corsican?

A. Yes, sir; I did. I find that I weighed into canal-boat Geo. Ames, October 8, 1869, 780 bushels.

Q. Have you in your hand the delivery tally-book of the Corn Exchange elevator, and does it contain the delivery tallies of the amount weighed out by you into the canal-boat Geo. Ames.

A. I have; and it does contain the delivery tallies of the amount weighed out by me into the canal-boat Geo. Ames.

Q. Are said tallies in your handwriting, and were they made by you at the date of the weighing out the said 780 bushels?

A. The tallies are in my handwriting, and were made at or about the date they purport to be made, in the usual course of business.

Q. Give the heading in said delivery tally-book, under which the delivery tallies made by you of the weighing of the said 780 bushels are written.

A. It is as follows: "Deliver boat Geo. Ames, Oct. 8, '69, order A. F. S. & Co., wheat, ex Corsican."

Q. Do the tallies under said heading foot up 780 bushels?

A. Yes, sir.

Q. Did you weigh out any other portion of the cargo of the Corsican, and when?

A. Yes, sir; on the 8th of October, 1869.

Q. Are the delivery tallies of said weighing out in your handwriting, and were they made by you at the date you weighed out the same?

A. A portion of them are in my handwriting, and I presume they were made on or about the date on the delivery tally-book, and in the usual course of business.

Q. What amount did you weigh out?

A. It appears that I weighed 3,300 bushels, by the delivery tally-book.

Q. What is the heading in the delivery tally-book under which the delivery tallies in your handwriting are made?

126 A. "Deliver Anna Rebecca, Oct. 8, '69, order A. F. S. & Co., wheat, ex Atmosphere, Phalarope, Camanche, Corsican."

Q. In whose handwriting is said heading?

A. In the handwriting of Mr. McCanna.

Examination of witness Bough continued.

Q. In the usual course of business of the Corn Exchange elevator, while grain is being received in store, state where is the place usually occupied by the weighman and machinery-man, respectively.

A. The weighman usually occupies the weigh-room, on the weigh-hopper floor, and the machinery-man occupies the floor next above the weigh-room, called the machinery-floor. The machinery-man is also around the building, oiling machinery, up and down stairs, to see if everything is all right, and to see that the machinery don't get heated. The machinery-floor is the highest floor, that extends over the whole building.

Q. How near the west or water front of the elevator are the places you have described as occupied by the weighman and machinery-man, while receiving grain at the elevator?

A. The weigh-room is right in the water-front of the building; the machinery-man is on the machinery-floor and around the building generally, to see that the machinery is nice and cool.

Q. In your usual course of business at the Corn Exchange elevator,

upon receiving cargoes of wheat in store, state how you are informed of the number of the bin or bins into which said cargo is placed.

A. I am informed by the machinery-man.

Q. When you are thus informed by the machinery-man, state whether or not you immediately make the entries thereof in the receiving tally-book.

A. I think I always did.

Q. State whether you have any other knowledge or information, from any other source than from the machinery-man, as to the bin or bins into which such cargo is placed in store.

A. I think he was my only informant.

Said plaintiff also read the deposition of George Minor, as follows:

GEORGE MINOR, having been sworn as aforesaid, testified as follows: I am forty-three years of age. I reside in the city of Oswego, and more than one hundred miles from the city of New York.

Q. During the year 1869, were you employed at the Corn Exchange elevator in the city of Oswego?

A. I was.

Q. In what capacity?

A. Running machinery.

Q. Were you known in the Corn Exchange elevator as the machinery-man?

A. Yes, sir; that was my business there.

Q. For how long a period were you there employed?

A. I commenced the first day of Sept., 1869, and continued there until the 10th day of December.

Q. During that period, who were also employed at the Corn Exchange elevator, and in what capacity?

A. Mr. McCanna was employed there as foreman. Mr. Charles Bough was employed there as weighman. Horace Maxon was employed as weighman. Robert Burgess was employed as weighman part of the time, and part of the time as machinery-man, and that is all.

127 Q. During the months of September, and October, 1869, in the usual course of business at the Corn Exchange elevator, what were your duties as machinery-man, in connection with receiving grain from vessels into store in the elevator?

A. My business was to prepare the machinery and put the grain into the house.

Q. State what would you first do upon the vessel being just brought alongside of the elevator?

A. In the first place I would go to work and get the machinery al' ready in the house.

Q. After you had got the machinery in working order, what would you next do?

A. I should then go to work and put the ship elevator into the vessel.

Q. Who assisted in putting the ship-elevator into the vessel?

A. I notify the men on the vessel, who shovel the wheat from the machinery-floor, that I am ready, and the shovelers put a fall to the ship-elevator, to pull it out from the warehouse, and I lower it into the ship's hold; next I go to the weighman, ask him if he is ready; if he is ready, I go then and put the water on the wheel, then I lower the ship-elevator clear to the bottom of the vessel. I next watch the weighmen until I see him drop a draft; after that I let out a little of the receiver below the weighing-hopper, to see if it goes to the bins I desired it to go; after that has gone to the bin, and I see it goes all right, *and* then I go

right on and discharge the whole vessel into the bins I have picked out for that cargo. I next go to the weigher and give him the numbers of the bins I am putting the grain into, and he puts them down on the tally-book.

Q. Who first adjusts the slides and spouts to conduct the wheat into the bins you have selected?

A. The weighman moves the first slide, to have it go to the lofter I am going to use. After the weighman shifts his slide I have my slides all ready to carry that grain to the bins I have picked out. I adjust all the slides, except the weighman's slide, under the hopper.

Q. Does any one, and if so who, name to you the bin or bins into which the wheat is to be placed in store before you have selected them or picked them out?

A. No, sir; I have that to do myself.

Q. In the usual course of business at the Corn Exchange elevator, what bins do you select into which to transfer the cargo of wheat from a vessel, with reference to such as have wheat already in or not?

A. I don't never put it into a bin I find has anything into it at all.

Q. After you inform the weighman of the number of bin or bins into which the cargo has been placed, what, if anything, do you see the weighman do with those numbers?

A. I watch him put them down as fast as I call them off.

Q. Into what?

A. On the tally-book—into the receiving tally-book.

Q. Under what heading?

A. Under the written heading in the tally-book.

Q. Are the books now shown you and handed you the receiving tally-books of the Corn Exchange elevator, in which are entered by the weighman the number of the bins into which cargoes were placed in Sept. and Oct., 1869, to which you have referred?

A. I know they are the Corn Exchange receiving tally-books, and I should say, to the best of my knowledge, they are the books. I recognize many of the figures in the books.

(NOTE.—The receiving tally-books produced and shown this
128 witness are the same books testified to by Sidney Bickford, Patrick McCanna, and Charles Bough. This note is made by the consent of the counsel for the plaintiff and defendants in these suits.)

Q. When cargoes of wheat were being received into store at the Corn Exchange elevator, do you know whether the name of the vessel stated in the heading of the tallies over the numbers of the bins to which you have referred is the name of the vessel at that time being discharged into such bins?

A. No, sir; as I have no chance to see a vessel unless I am on the dock when the vessel comes up and I happen to see her name.

Q. So far as you have knowledge, state whether the name of the vessel being unloaded at the elevator is correctly stated in the heading of the tally of receipts in the receiving tally-books of the elevator.

A. I should say it was.

Q. Did not you usually know what vessel was being unloaded at the elevator, at the time its cargo was received in store?

A. No, sir.

Q. Was you not usually informed of its name by either the foreman or weighman, or some other person?

A. No, sir; not until after the vessel is unloaded, and then I would not know it unless I should ask what the name of the vessel was. It was no part of my business to know.

Q. When cargoes of vessels were discharged into the elevator, state whether or not you usually ascertained the name of the vessel before the vessel left the harbor?

A. No, sir.

Q. When grain was being delivered from bins in the elevator, into canal-boats, how were you engaged as machinery-man?

A. I would be engaged in the building, shifting machinery into such position as would put it out.

Q. What would you first do?

A. I would throw off that portion of the machinery that I had been using to take into store with, and throw in the part that would convey it out again. After I got all ready, I would go and notify the machinery-man that I was ready, by the bell; and if he notified me first, I would go and start right up any way; then whatever bins it was to come from the foreman would give me the figures to draw from; and the next move would be, I would commence to watch the feed to see that they did not get too much on, to choke the machinery down, and then I would stay on the floor and watch the spouts.

Q. On what floor of the warehouse were you usually while grain was being discharged from the elevator into a canal-boat?

A. Usually on the lower floor, called the dock-floor.

Q. Do you have communication from that floor with the weighman in the weigh-room?

A. No, sir; only by bell, signaling him, and he would come and look out of the window and I would speak to him.

Q. Who would give you the order to get the machinery ready for delivering grain from the elevator into canal-boats?

A. The foreman, Mr. McCanna.

Q. How would he usually give you that order?

A. Verbally; he would come to me myself.

Q. Did you or not generally or usually see the delivery tally-books, or either of them, before the grain was discharged from the elevator into canal-boats?

129 A. I would sometimes, once in a great while. Sometimes the foreman would send me to the weighman, with the tally-books, and then of course I would see them.

Q. Did you, during the discharge of grain from the elevator, have charge of the slides in the spouts running from the bin to the conveyor?

A. Yes, sir.

Q. How or from whom did you know from what bins the grain was to be discharged from the elevator into the canal-boat?

A. From the foreman.

Q. When and how did he, the foreman, give you the number of the bin or bins from which the grain to be discharged from the elevator into a canal-boat was to be taken?

A. He would sometimes give the number on a slip of paper, and sometimes he would call them over without a slip.

Q. Had you any other, and what other, knowledge of the bin or bins from which grain was to be discharged from the elevator, into canal-boats, than that given you by the foreman, Mr. McCanna?

A. I had no other way of knowing.

Q. Did Mr. McCanna, the foreman, keep the run of the bins into which grain had been put?

A. Yes, sir.

Q. Was or not Mr. McCanna, foreman, on the dock-floor at times and from time to time, when wheat was being taken from numbered bins?

A. Yes, sir.

Q. Did Mr. McCanna, the foreman, frequently, and how frequently, receive from you a statement or statements of the bin or bins from which wheat was being taken, or from which wheat had been taken?

A. Every time it goes either in or out, whichever the case may be. If we are putting it out, he comes to me to find the numbers of the bins from which I had taken it, and I give him the numbers. If I am taking it in he also comes to me in the same way, and I give him the numbers of the bins; and I frequently tell him, though he has the tally-books before him, to see if it corresponds with the tally-book.

Q. Was Mr. McCanna, the foreman, active in his duties, as such, in September and October, 1869, at the Corn Exchange elevator?

A. Yes, sir.

Q. Was he careful and accurate in the duties of the business of the Corn Exchange elevator?

A. I should say so by all appearance, and by all that I have seen of him.

Q. In delivering wheat from numbered bins into canal-boats, was it or not, or how was the fact, usual or customary to mix different cargoes on the same conveyor?

A. No, sir.

Q. What was the usual and ordinary course of business at said warehouse, in delivering wheat from numbered bins, when any portion of the wheat thus delivered was from two different vessels, as to mixing the said wheat on the conveyor?

A. I never did. If I did, I never knew it; because I would get sacked if I did it.

Q. Were you or not, or how was the fact, particular, and how particular, about keeping separate and distinct each cargo of wheat which went into said elevator, or was discharged therefrom?

A. I put that grain, every pound of it, where I was ordered by the foreman. I was particular to keep it separate; I had to be, be-
130 cause you are not allowed to mix grain more than once or twice before you get discharged. When the cargo goes out it is not mixed, to my knowledge.

Q. Have you any knowledge that any cargo of wheat which went into the Corn Exchange elevator in September or October, 1869, was either, in its receipt into the elevator or discharge therefrom, mixed with any other cargo of wheat?

A. No, sir.

Q. When the foreman, McCanna, gave you orders to prepare machinery for delivering grain or wheat from the elevator, did he, or not, always give you the number of the bin or bins from which to draw the grain or wheat?

A. Yes, sir; he always did.

Q. Did he or not give the name of the vessel?

A. Sometimes he would, and sometimes he would not.

Q. How was the fact usually?

A. Not very often that he gave the name of the vessel. It is not necessary that he should give me the name of the vessel, unless he does of his own accord.

Q. Why is it not necessary that he should give you the name of the vessel?

A. Because he knows what bins the cargo of the vessel is in, and it is only necessary for him to tell me the number of the bins it is in.

Q. In the ordinary course of business do you draw from more than one bin at one and the same time?

A. Yes, sir; because when I take a cargo into the house I put half on the north side and half on the south side, and when I draw, to put into a canal-boat, I draw equally from each side of the house; if it takes fewer bins to hold the cargo, I draw out of these equally from both sides of the house to lighten up both sides of the house alike.

Q. In the ordinary course of business, do you draw from more than one bin from the same side of the elevator at one and the same time?

A. I do, if the same cargo of wheat is in two bins on the same side of the house.

Q. From how many spouts on one side of the elevator will the lower conveyor upon the same side of the elevator conduct grain at one and the same time, without choking or disarranging the working of the machinery?

A. There are two slides from each bin, and I have seen the time I could draw two full slides from one bin; and when I see the machinery would carry it I have gone to another bin having the same cargo and put on a part of a slide, and sometimes a full slide from that.

Q. What kinds of grain will discharge from bins most rapidly?

A. Rye.

Q. Do you usually run more than two full slides *or* from one bin of wheat at one and the same time into a conveyor?

A. No, sir; unless it is poor running grain, and then if I see it is poor running grain and of the same cargo, I put on another slide. If there is more of the same cargo in the elevator, then I open the two slides full, and let it run in that way, if it takes all day to deliver the cargo.

Q. Describe the effect of running too much grain upon one conveyor at one and the same time.

A. If I should put too much feed on to the conveyor the lofter would choke down, the wheat would all come down on to the lower floor, and I would have to shovel it up again.

Q. During the months of September and October last, did you run wheat from different cargoes on the same conveyor at the same time?

A. No, sir; for I ain't allowed to do so.

Q. During the months of September and October last did you
131 receive any orders from the foreman, Mr. McCanna, or from any other person, to run wheat from different cargoes on to the same conveyor at the same time?

A. No, sir.

Q. When orders were received to deliver wheat from different cargoes into the same canal-boat, what course would you pursue in respect to delivering them from the respective bins whether separately or together?

A. I would draw one cargo all out, and then I would go and notify the foreman that bin was out, what there was in it, and if he said go to the next number, whatever number he would give me, then I would go and draw from that, and again report to him; each time I drew out all there was in the bin I would report to the foreman.

Q. When orders were received to deliver wheat from different numbered bins without naming the cargo, and without your having any knowledge what cargo was placed in such numbered bin, what course would you pursue in respect to delivering wheat from those respective bins, whether separately or jointly?

A. I would draw from the numbers the foreman would give me. If he gave me four numbers I would draw one of the bins all dry, and then

go and notify the foreman, Mr. McCanna, and so on, until I had drawn out the four bins.

Q. In such case, which of the four bins would you draw first?

A. The first one of those numbers he gave me.

Q. And which number next?

A. I would go to the next bin in the order of the number the foreman gave me, and so on, until I had drawn them all dry.

Q. After you had drawn this wheat from the first numbered bin given you by the foreman, when would you draw the wheat from the several numbered bins given you by the foreman?

A. After I would go to him and notify him the first one was out.

Q. And when the third numbered bin?

A. I would commence on the third when the second one was empty, and I had notified the foreman.

Q. And when the fourth numbered bin, if there was four?

A. I would commence on the fourth bin after third bin was dry, and I had notified the foreman.

Q. Was there a writing-desk on the lower floor of the elevator, near the water-front, in September and October, 1869?

A. Yes, sir.

Q. What was that desk for, and who used it?

A. I have seen the foreman take the tally-books and on it figure the amounts that had been taken in or delivered, whichever the case might be.

Q. State whether you have seen the foreman, McCanna, make other memoranda or writing upon that desk?

A. I have frequently seen him take a slip of paper and give the number of bins on it written on the desk.

Q. Have you seen the foreman, McCanna, at different times, and from time to time, write down or check off the number of bins which you gave to him while delivering grain, as they were severally emptied, or make any other memorandum in respect thereto?

A. Yes, sir.

Q. During the months of September and October, 1869, did you see the bin-book kept by the foreman, Mr. McCanna?

A. I have seen him have one. Every time I would go to him
132 and notify him that a bin was empty, he would take it out and check it off, so that he would know that it was empty.

Q. While grain was being received into and delivered from the elevator in the usual course of business, how frequently would Mr. McCanna, the foreman, pass through and into the different portions of the elevator?

A. In taking in one cargo, I have seen him from three to four times pass around all through the building in different parts.

Q. Was that the usual number of times while a cargo was being received into the elevator?

A. As a general thing, that is his usual practice, that number of times.

Q. State as to while a canal-boat load was being delivered from the elevator?

A. He is always on the deck-floor during this time. He may be away two or three minutes at a time.

Q. How near to the slides that are discharging wheat from numbered bins on to the lower conveyor?

A. He is right there, close to it. He is so near that he can see that slide operate every few minutes.

Q. State whether you at any time gave to the foreman, Mr. McCanna, the numbers of the bins into which the cargo has been stored.

A. I don't never give it to him, because Mr. McCanna always asks me what bins I put the cargo into. I then tell him the numbers. He then examines the entries in the receiving tally-book, to see if they correspond, and if they don't correspond, they go to the bins I have put it into, and get the numbers, just as it should be.

Cross-examination by defendants:

Q. (By Mr. Van Santvoord.) I think you said you were employed as machinery-man at the Corn Exchange elevator to December 10, 1869?

A. I did.

Q. During that time, was any other person employed as machinery-man, and during what portion of the time?

A. Mr. Burgess was machinery-man with me when I was first hired there, and he was with me something over two months in that capacity.

Q. Did he work as an assistant to you as a machinery-man?

A. He did. The two of us constituted the machinery-men for that period.

Q. Did you both work together at the same time, or did you take trick and trick about?

A. It was necessary for us both to be there sometimes, and at times when we were drove hard we would make regular tricks, and when not driven hard we would work together.

Q. Was it the duty of the machinery-man to work the machinery of the elevator on taking the wheat in and delivering it out of the elevator or warehouse?

A. Yes, sir.

Q. On receiving wheat into the warehouse, was it his duty to inform the weigher at the weigh-hopper of the bin or bins into which the wheat was put, by giving him the number of the bins?

A. Yes, sir.

Q. In delivering wheat from the bins, was it your duty, as machinery-man, to follow the direction of the foreman?

A. Yes, sir.

Q. Do you know whether on receiving wheat into the elevator from a lake vessel, the tally-book, with a heading prepared by the fore-
133 man, was placed in the hands of the weigher, at the weigh-hopper upon which to enter his tallies?

A. I did not see it carried to the weighman at all times, nor see the weighman have it at all times; but then he would have to have it.

Q. Do you know whether, on delivering wheat from the elevator or warehouse, the weighman was furnished with a book, with a direction by the foreman written on it as to deliveries on which to enter his tallies of deliveries?

A. Yes, sir.

Q. Is there any record preserved of any direction as to deliveries on any book belonging to the elevator, except the direction written on the delivery tally-book by the foreman?

A. Well, that I don't know.

Q. What did you mean in testifying that grain was never mixed at the elevator, and if that happened more than once, the machinery-man would be sacked, or words to that effect?

A. When I said they wasn't allowed to mix grain, I understood it that meant they should not mix all kinds of grain together; that is, wheat, oats, and corn.

Q. If directed to run out wheat from different bins together, or from different cargoes, by the foreman, would you, as machinery-man, follow the directions?

A. Yes, sir; I would do as he told me to.

Q. In testifying yesterday, as to deliveries, did you testify from the general course of business, when the object is to keep the wheat received into the elevator separate, each lot by itself, from the receipt into the elevator or warehouse, until its delivery therefrom?

A. Yes, sir. I always had that in view, because I supposed so, that when each cargo was called for they would know where it was.

Q. Did you keep any account of receipts and deliveries into and from the elevator?

A. No, sir.

Q. Was it any part of your business, as machinery-man, to keep any account of receipts or deliveries?

A. No, sir. That is, no further than to go and give the number of the bins to the weighman on receiving grain into store.

Q. As machinery-man would you know anything about the names of vessels from which wheat was received, or the names of boats or parties to which or to whom it was delivered?

A. I would not, unless I took special pains to go and look, and that I hardly ever do.

Q. Can you state from any recollection, or by memorandum made by you, the manner of delivery of wheat received from the Kate Kelly, Camanche, Phalarope, Grenada, Gerrit Smith, Thomas Parsons, Atmosphere, Corsican, Atwater, or D. G. Fort?

A. No, sir; because it is not my business to make any memorandum.

Redirect, (read by plaintiff:)

Q. (By Mr. Geo. G. French.) Do you remember whether cargoes of wheat which were said to have come from Milwaukee by the vessels named in the last cross-interrogatory, or either of them, were discharged into the Corn Exchange elevator during the months of September and October, 1869?

A. I think, to the best of my knowledge, I have some recollection of some of those vessels being discharged there; that is, into the Corn Exchange elevator.

134 Q. If so discharged into the elevator, were said cargoes placed in different bins and kept separate from each other?

A. In the manner of doing business I should answer I should think they was, unless the wheat was of the same kind, and the foreman gave me orders to put the two together.

Q. Have you any knowledge or recollection of any such order having been given to you by the foreman during the months of September or October, 1869?

A. To the best of my knowledge I don't recollect of the foreman giving me any such order.

Q. If such cargoes were so received into the elevator, were they kept separate while being delivered from the elevator?

A. I should say it was, unless it was both of same quality of wheat, and I had an order from the foreman to mix them.

Q. While said wheat was being delivered from the elevator, did you receive any order from the foreman to mix different cargoes; and did you, during such delivery, at any time mix different cargoes of wheat?

A. To my knowledge he never gave me such an order; and to my knowledge I did not mix them if I know it.

Q. From Sept. 1st, 1869, to Dec. 1st, 1869, how much of the time were you absent from the elevator during the hours when said elevator was being worked?

A. I could not tell that.

Q. Were you there every day?

A. I was there every day with the exception of Sundays. I did not lose a day during the three months I was there.

Q. For how much of the time were you engaged with Burgess in running the machinery, each at different hours on the same day, with tricks on and tricks off, as you call it?

A. Well, I could not tell that actually. I think to my best recollection we worked trick and trick about two months. Each trick was 6 hours on, 6 hours off.

Q. When Burgess and yourself were both there together, what was your duty, and what was Burgess' duty?

A. When we were both there together, we would both take hold and get the machinery ready. If it was my trick I would be principal, and if it was his trick he would be principal.

Q. In Sept. and Oct., 1869, state whether or not there was any exception to the rule or course of business at the elevator to keep different cargoes of wheat separate from each other?

A. I don't recollect of any such exception.

Q. (By Mr. Van Santvoord.) Do you sometimes get directions from the office as to deliveries?

A. I never got any orders from Smith & Co., or Bickford, or Forsyth. I always get it from the foreman, to the best of my recollection.

GEORGE MINOR.

Taken, subscribed, and sworn to before me, this 25th day of May, 1870.

ALFRED B. GETTY,
United States Commissioner.

135 Said plaintiff also read deposition of Horace Maxon, weighman, who testified the same, as to the course of business, of his duty as weighman, as Bough, and testified to weighing in portions of the cargoes of the Kate Kelly, Grenada, and Corsican, and entering the tallies thereof in the receiving tally-book, and also weighing out portions thereof and entering the tallies in the delivery tally-book.

Plaintiff also read the deposition of Robert Burgess, machinery-man, as follows:

ROBERT BURGESS, having been duly sworn as aforesaid, did depose and say:

My age is forty-four years. I reside in the city of Oswego, which is more than one hundred miles from the city of New York.

Q. Have you been employed to work at or in the Corn Exchange elevator in the city of Oswego; if yea, in what capacity and during what period?

A. I have been, and was from the 18th of August, 1869, to the 12th day of December, 1869, in the capacity of machinery-man, and also acted as weighman some of the time.

Q. During the months of September and October, 1869, state what other persons were also employed in that elevater and in what capacity.

A. Patrick McCanna, as foreman; Charles Bough, as weighman; Horace Maxon, weighman; George Minor, machinery-man.

Q. During the months of September and October, 1869, in the usual

course of business at the Corn Exchange elevator, what were your duties as machinery-man with respect to transferring grain from vessels into store in the elevator?

A. To run the machinery, and, after the grain left the weighman, spout it into bins.

Q. State whether you assisted in getting the vessel alongside the dock or in introducing the leg of the elevator into the vessel.

A. I did when the other machinery-man was there, occasionally, but when I did that I had nothing to do with the machinery.

Q. When you acted as machinery-man in receiving cargoes of wheat into store, in your usual course of business, state what you would first do after the vessel was made fast alongside the dock.

A. Throw that part of the machinery that runs the ship-elevator into gear, raise the ship-elevator, and the shovelers would pull it out from the elevator, and put it into the hold of the vessel, and start up the machinery, and lower the ship-elevator into the hold of the vessel. The ship-elevator is then ready to carry up the grain.

Q. Proceed, and describe what next you do.

A. I go to the weighman and ask him if he is ready, and then start up the elevator and commence elevating if he says yes, and when the grain leaves the weighman conduct it to the bins.

Q. Describe what examination you make of the bin or bins into which the wheat is to be placed before you commence elevating.

A. I examine to see if there are no leaks, and no other grain is there.

136 Q. State whether, in selecting bins, you select those which are empty, or those which are partly filled.

A. That depends upon circumstances—how full the house is.

Q. When there are empty bins and those that are partially filled, which, in the ordinary course of business at the elevator, would you select?

A. I would select the empty ones.

Q. Would you at any time transfer any cargo of wheat into any bin or bins partially filled with wheat without special directions from the foreman?

A. Yes.

Q. During the months of September and October, 1869, did you transfer any portion of our cargo of wheat into any bin or bins before then partly filled with any other cargo of wheat?

A. Not, to my recollection, from a schooner.

Q. During the months of September and October, 1869, did the foreman, Mr. McCanna, give you any orders or directions to transfer any portion of our cargo of wheat into any bin or bins in which there was then wheat from some other cargo?

A. I cannot say.

Q. In your usual course of business at the elevator, after you had selected the bins into which to place a cargo of wheat in store, to whom did you give the numbers of the bins?

A. As a general thing, to the weighman.

Q. Was that before or after the cargo was transferred into store?

A. There was no set time.

Q. How was it usually?

A. When we were running on the last bin.

Q. Did you also inform the foreman, Mr. McCanna, of the numbers of the bins into which the cargo was placed?

A. Not very often.

Q. Were the numbers of the bins into which cargoes were placed in store usually entered by the weighman under the heading to the tally of receipts in the receiving tally-book of the same cargo of the vessel named in such heading?

A. I could not say, being on the floor above the weighman.

Q. Who regulates and adjusts the slides and spouts for the discharging of the cargo into the numbered bins you have selected?

A. The machinery-man, after it gets at the foot of the lofter.

Q. During the months of September and October, 1869, state whether or not, when you acted as machinery-man, each cargo of wheat was placed in the numbered bins which you had selected, and the numbers of which you gave to the weighman as the numbered bins into which each cargo was being placed.

A. I should think they were the right bins. I think they were the numbers of the bins I had selected, and had given to the weighman.

Q. State whether or not, while you acted as machinery-man at the Corn Exchange elevator, you knew what vessel was being unloaded at the elevator at the time its cargo was being received in store.

A. Very seldom. I kept no figures at all.

Q. While the vessel was alongside the dock would you then know its name?

A. I would not know one in twenty, because I would be five stories up.

137 Q. Would you, if you were not acting as machinery-man, know or be informed of the name of the vessel?

A. Yes.

Q. During the months of September and October, 1869, what proportion of the vessels unloaded at the Corn Exchange elevator did you at that time know the name of?

A. I don't know that I knew the name of any in any particular month.

Q. When grain was being delivered from the Corn Exchange elevator, where was your place as machinery-man?

A. On the machinery-floor, which is in the 5th story, above the weighman; but after we got the machinery started and the grain running all right, we relieve the dockman at the lower conveyor.

Q. While grain is being delivered from the elevator, where, usually, is the foreman, Mr. McCanna?

A. As a general thing he is walking back and forth on the lower floor, the dock-floor, where the lower conveyor is.

Q. During the months of September and October, 1869, while you acted as machinery-man at the elevator, state whether or not you were directed by the foreman, Mr. McCanna, to deliver wheat from certain numbered bins specified by him.

A. I don't know whether or not I drew a slide by his order. They were generally removing when I came down from the machinery-floor.

Q. At such times, when you came down from the machinery-floor, who had charge of the spouts leading from numbered bins, from which wheat was being discharged?

A. Patrick McCanna, the foreman.

Q. State whether or not he would then inform you whether any other and what numbered bins were to be discharged into the boat then being loaded.

A. He would tell me to draw from those spouts until the boat was loaded.

Q. Would you follow his directions?

A. Yes, sir.

Q. When wheat was to be discharged from the elevator who would give you orders as to the discharge and to get the machinery in readiness; and would such orders be written or verbal?

A. The foreman would give them. They would be verbal.

Q. In delivering wheat into store at the elevator, according to the usual course of business, describe how you would give the numbers of the bins into which the cargo was placed to the weighman, and what he would say, if anything, in response.

A. I would say, "Weighman, this cargo is going into such numbers;" as, for instance, 3, 4, 5, and he would say, "All right," and sometimes repeat the numbers after me.

Q. During the months of Sept. and Oct., 1869, did you at any time act as weighman at the Corn Exchange elevator?

A. No, sir.

Q. Have you examined the tallies of receipts and deliveries in the receiving and delivering tally-books of the Corn Exchange elevator, made during the months of Sept. and Oct., 1869, and were any of said tallies made by you; and, if so, which?

A. I have examinad said tally-books, and there are none whatever made by me.

Q. State whether or not there is a writing-desk upon the dock-floor of the Corn Exchange elevator.

A. Yes, there was one there last season when I worked there. I put it up.

138 Q. During the months of Sept. and Oct., 1869, state whether or not you saw the foreman, Mr. McCanna, frequently from time to time make written memoranda or write upon that desk.

A. I have seen him write there frequently, and what he was figuring at I don't know. I don't know as he was figuring.

Q. (By Mr. Van Santvoord.) On receiving wheat into the elevator from lake vessels was the weighman at the weigh-hopper furnished with a tally-book with a heading prepared by the foreman on which to enter the tallies?

A. I cannot say what book it was. I saw a book in his hands, and I did not open it. I should think it was like one of those receiving-books shown me.

Q. Do you know whether, on delivery of wheat from the elevator or warehouse, the weighman was furnished with a book, with a direction written by the foreman on it as to deliveries, on which to enter his tallies of deliveries?

A. I have often seen it.

Q. Is there any record kept of any direction as to deliveries on any book belonging to the elevator, except the direction written on the delivery tally-book by the foreman?

A. I don't know of any.

Q. In giving directions to you as machinery-man to deliver wheat, would the foreman give you the numbers of the bins from which to deliver it?

A. No, very seldom, because the foreman would start the feed while I was in the machinery-room.

Q. If the wheat was to be delivered from several bins, would he give the numbers of the other bins after the first two?

(Objected specially by plaintiff's counsel, because it assumes what has not been proven.)

A. Yes, sir.

Q. Did you keep an account of receipts into and deliveries from the elevator?

A. No, sir; not a figure either way.

Q. As machinery-man, would you know anything about the names of vessels from which the wheat was received or the cargoes in the bins from which you were directed by the foreman to deliver wheat?

A. Once in a great while I might recollect what and where the cargo was, but as a general thing I could not, as I kept no tallies of anything, and kept no trace of it.

Q. Can you state from any recollection, or any memorandum made by you, the manner of delivery of wheat received form the Kate Kelly, Comanche, Phalarope, Grenada, Gerrit Smith, Thomas Parsons, Atmosphere, Corsican, Atwater, or D. G. Fort?

A. I cannot.

Q. In running wheat out from the elevator into a canal-boat, or a boat, was it usual to run it out by two conveyors?

A. If it was on both sides of the house we would use both conveyors; if it was on one, we would use one conveyor.

Q. What is the capacity of the numbered bins in the Corn Exchange elevator?

A. 4,000 bushels.

Q. Would a conveyor fed from only one bin run full until that bin was exhausted?

A. That depends upon the power; and if we had a bad wheel we could only do half the amount.

Q. Would a conveyor fed from only one bin run full until that bin was exhausted?

A. Yes, sir; I should think it would about.

139 Q. Was there any practice in the Corn Exchange elevator when the foreman gave directions to the machinery-man to deliver wheat from three or four bins on the same side of the house, to run one bin entirely out before pulling the slide from another bin?

A. No. We used to make it a practice to run from three or four different bins the cargo was in at the same time. What the other fellow did I don't know; the different machinery-men have different notions.

Q. How long had you been machinery-man at the Corn Exchange elevator in September and October, 1869?

A. 14 months.

Q. Did you ever know of such practice, at the Corn Exchange elevator, when directions were given to deliver wheat from 3 or 4 or more bins, of running one bin entirely out and then reporting to the foreman before commencing another bin?

A. Yes; frequently.

Q. Under what circumstances?

A. When we have such orders from the foreman.

Q. In the absence of any such orders, is there any such practice?

A. Not when I am down there. I don't know what the other man does.

Q. Did you state on your direct examination that you recollect no orders from the foreman in September or October, 1869, to transfer cargo into bins where other wheat was?

A. I believe I did so state.

Q. Was it an unusual thing at the elevator for the foreman to direct the transfer of wheat from a vessel into bins where there was other wheat received for the same party and of like quality?

A. It has been done.

Q. Has it not been usual at the Corn Exchange elevator to mix grain, whether corn, wheat, or barley, received for the same parties, and of the like kind and quality?

A. Yes; it has been done.

Q. If there should be wheat in a bin not more than half full or not full, would it be usual, according to the course of business at the elevator, to put other wheat of the same kind and quality, received for the same party, into the bin to fill it up?

A. Yes; especially if crowded with work.

Q. Would the same be true of corn and barley?

A. Yes; just the same. I have had to do it frequently. I have put a cargo of barley into 15 different bins to top off with.

Q. Is wheat of different qualities kept in separate and distinct bins from each other?

A. As a general thing.

Q. Is the machinery-man at the elevator usually acquainted with the difference in the qualities?

A. I answer for myself. I am counted a good judge of grain.

Q. Is it common for machinery-men to be acquainted with the quality of grain?

A. No, sir; they have not, generally, the experience I have had.

Q. Then a machinery-man without that experience would require further direction as to where to place it than you would with that experience?

A. Yes.

Q. In running out grain from the elevator, was it an usual thing, according to the course of business, to run out wheat together
140 which might be from different vessels if received for account of the same party and of the like kind and quality?

A. It is often done; but ain't the straight course of business, in my opinion.

Q. Would it be done if directed by the foreman of the Corn Exchange elevator?

A. Yes; we would have to do it if he directed it.

Redirect:

Q. (By Mr. Finch.) Was any portions of the cargoes of either of the schooners Kate Kelly, Corsican, Grenada, Thomas Parsons, Atmosphere, Gerrit Smith, Atwater, or D. G. Fort, or either of them, to your knowledge, mixed while in the Corn Exchange elevator?

A. I cannot say, sir.

Q. Have you now any recollection that, in the month of Sept. or Oct. last, any wheat, for any party, was mixed in such elevator?

A. Not to my recollection.

Q. Was it or not the usual course of business at said elevator to mix different cargoes of grain while in said elevator?

A. It was not a usual thing; no.

Q. When there was plenty of storage-room in said elevator, were different cargoes of wheat ever mixed in said elevator?

A. No.

Q. Did you at any time, as a machinery-man at said elevator, unless specially directed by the foreman so to do, usually draw from bins the wheat of different cargoes?

A. I draw from the bins he bids me; I don't know the cargoes.

Q. Did you, at any time in Sept. or Oct., 1869, see the foreman, Mr. McCanna, with his bin-book?

A. I couldn't swear I did. I used to see him with something like a pocket-book, which he kept in his breast pocket.

Was it or not a common occurrence in Sept. and Oct., 1869, for the foreman to direct the transfer of wheat from a vessel into bins where there was other wheat received for the same party and of like quality?

A. Not to my recollection.

Q. Have you any recollection that the foreman, in Sept. or Oct., 1869, gave any direction to transfer wheat from a vessel into bins when there was other wheat received for the same party and of the same quality?

A. No recollection whatever.

Q. Then, was it or not an usual thing at said elevator to mix the cargoes of vessels, although for the same parties and of the same quality?

A. Not to my knowledge.

Q. Can you now call to mind an instance where it was done in said elevator?

A. Yes; in '68.

Q. Any other time?

A. I do not recollect any other time.

Q. State whether or not it was the general and usual course of business at said warehouse to keep each cargo of wheat separate and distinct while in said warehouse.

A. It was the calculation to try to keep them separate.

Q. Are the bins in said warehouse so managed that each cargo of wheat can be kept separate?

A. Yes, sir; except we are crowded too much in the fall. As a general thing we can keep them separate.

Q. Had the machinery-man any knowledge who was the owner of the wheat being received into the elevator?

A. None whatever.

Q. During your cross-examination, was A. F. Smith, of the firm
141 of A. F. Smith & Co., present, and suggesting to the counsel of the defendants?

A. He was present, but did not hear him say anything.

Q. Did you see him during your cross-examination, sitting by the side of and conversing with said counsel?

A. I saw him sitting by the side of Mr. Van Santvoord, but did not know whose counsel he was.

Q. Was it or not, in Sept. or Oct., 1869, an usual thing, according to the course of business, to run out, at the same time, grain from the elevator which was from different vessels, although for the account of the same party?

A. Not to my recollection.

Q. Has A. F. Smith, of the firm of A. F. Smith & Co., had any conversation with you about any matters relating to this grain, or about your testimony in this case, or relating to the matters to which you have testified, or any other conversation with you within the last three months?

A. Not the first word.

ROBERT BURGESS.

Taken, subscribed, and sworn to before me this 25th day of May, 1870.

ALFRED B. GETTY,
United States Commissioner.

The plaintiffs then read in evidence from the deposition of Norris Winslow, taken before U. S. Commissioner Getty, at Oswego, May 12, 1870.

NORRIS WINSLOW testified as follows: I reside in Watertown, N. Y., and more than one hundred miles from the city of New York; my age is thirty-five years.

Q. Did you do business in Watertown, N. Y., in September and October, 1869, under the name of the Merchants' Bank?

A. Under the name of the Merchants' Bank, Norris Winslow, banker.

Q. Was there any other bank at Watertown known as the Merchants' Bank?

A. Not to my knowledge.

Q. Was any other person, and who, if so, interested with you as owner, or otherwise, in said Merchants' Bank?

A. No one was interested with me; I was the sole owner; the business was done exclusively as a private bank, and all drafts and certificates so stated.

Q. Did you know in September and October, 1869, the firm of A. F. Smith & Co., in Oswego, N. Y.?

A. I did.

Q. How long had you known said firm of A. F. Smith & Co., in Oswego?

A. If I recollect right, in the neighborhood of a year and a half.

Q. What was their business in Oswego, as far as you know?

A. I supposed them to be commission merchants, and buying and selling grain perhaps, and dealers in grain.

Q. Did you know them as proprietors of the Corn Exchange elevator in Oswego?

A. I did.

Q. What was their business as proprietors of said elevator?

A. I supposed it to be the ordinary business of receiving, shipping, and storing grain.

Q. How long had you known the warehouse or elevator situated in Oswego, called the Corn Exchange elevator?

A. I had known it for some years prior to 1868, by seeing the name printed on the building, in passing through the city.

Q. Were you at any time, and when, owner, or part owner, of the said warehouse?

142 A. I purchased a third interest, I think, in the early part of 1869.

Q. Who were the owners with you of the said elevator?

A. Mr. Delos DeWolf and A. F. Smith, of the firm of A. F. Smith & Co., I understood it to be; I am not positive of that.

Q. Did A. F. Smith & Co. lease the warehouse or elevator, and, if so, from whom and when?

A. I leased them my interest in May, 1869, for one year.

Q. Did the Merchants' Bank, at Watertown, receive any consignments of wheat in September or October, 1869, from the several plaintiffs in these several suits, or any or either of them, and which of them?

A. I can say we received consignments from some of these parties, but whether in September or October, or as to the time, I cannot say.

Q. Who in the Merchants' Bank gave personal attention to or had charge of such consignments?

A. The business was all under my charge.

Q. Did you give directions in relation to such consignments?

A. Those cargoes were, by my direction, ordered delivered to the Corn Exchange elevator.

Q. Have you with yo' letter-press copies of the letters which by your direction were written to A. F. Smith & Co., proprietors of the Corn Exchange elevator, or to A. F. Smith & Co., or to the Corn Exchange elevator, in relation to the cargoes of the plaintiffs, or either of them, consigned to the Merchants' Bank, in the latter part of September, and in the month of October, 1869?

A. I think I have some of them. I don't know whether I have them all or not.

Q. Were the said letter-press copies taken from the letter-book of the Merchants' Bank, and when, and about when, and by whose order, and for what purpose?

A. They were taken out to show counsel; can't tell when. I don't recollect whether I took them out or some of my clerks.

Q. Did you take them to your counsel?

A. I don't recollect.

Q. Will you produce all of said letter-press copies that you have with you?

A. I will produce them.

Q. Are the copies now produced by you the said letter-press copies?

A. They are.

Q. Are the copies hereto annexed and made a part of your deposition, and by the commissioner marked respectively Exhibits J. F. M., No. 1; J. F. M., No. 2; J. F. M., No. 6; copies of the said letter-press copies produced by you?

A. They are.

The exhibits were read by the plaintiffs.

Q. Were the letters of which the letter-press copies produced by you purport to be copies, written under printed headings, similar in form to the one now shown you marked Exhibit No. 14, (A. B. G.)?

A. Our letters were generally written under such a heading.

Q. Who did the general correspondence of the Merchants' Bank in September and October, 1869?

A. I generally either wrote or directed all special, or letters of importance.

Q. Did you give general oversight and attention to the business of the Merchants' Bank at that time?

A. I was away a portion of those two months, more or less.

143 Q. What portion of the month of Sept. were you away, and for how long a time?

A. I can't state what time I was away. I was engaged in politics, and was away from the office more or less during these two months. I was also quite extensively engaged in building, which occupied my time to such an extent that I was not able to give the bank or the business of the bank the attention I ordinarily did.

Q. Who in your absence had charge of the business of the bank?

A. Mr. J. F. Moffatt had charge of the books of the bank and discounted the paper for such parties, and attended to such other business as I instructed.

Q. Did you instruct him to write the letters, letter-press copies of which, taken from the letter-book of the Merchants' Bank, you have here produced?

A. I don't know as I instructed him to write those particular letters, but he had written similar letters before with my knowledge.

Q. Will you state that you did not instruct him to write said letters?

A. I will.

Q. When, or about when, did you first know that the said letters or any of them had been written?

A. Very soon after they were written.

Q. How did you know it?

A. By my seeing to collections, and upon my inquiries as to what disposition had been made of the grain.

Q. Have you not already stated that the cargoes by your direction were ordered to be delivered to the Corn Exchange elevator?

A. I have, as appears by the letters written by Mr. Moffatt.

Q. Did you see the drafts and bills of lading, or any or either of them, forwarded by the plaintiffs, or either of them, to the Merchants' Bank, in Sept. or Oct., 1869?

A. I saw some of the drafts. I don't know whether I saw the bills of lading or not; might have seen them; can't say positive whether I did or not.

Q. When in the bank, did you read over the correspondence or any part of it?

A. I generally did.

Q. Who in your absence did the correspondence of the bank?

A. The clerks.

Q. What clerks generally?

A. Mr. Moffatt, Mr. Greenleaf, and sometimes Mr. Chamberlin. Mr. Moffatt did the most of it.

Q. Was there any other person in your bank who performed the duties of cashier but Mr. Moffatt?

A. No, sir; I don't know as there was.

Q. When or about when did you first know that any of the wheat in question in these suits, or either of them, had been removed or shipped from the Corn Exchange elevator?

A. A short time after the failure of A. F. Smith & Co.

Q. Did you, or any one on behalf of the bank, give notice to the plaintiffs, or either of them, of the removal of the wheat?

A. I gave them notice personally, in Oswego, very soon after the failure.

Q. Did the Merchants' Bank, after the failure of A. F. Smith & Co., transmit to the parties in Milwaukee, from whom they received the drafts and bills of lading, the same after the failure and suspension of A. F. Smith & Co.?

A. They were returned and protested as fast as they became due, I suppose, in all cases.

Q. Did the Merchants' Bank receive or retain any, and what, amount of the proceeds of the sight-drafts forwarded by the plaintiffs, or either of them, in Sept. and Oct., 1869?

144 A. I cannot say. In some cases we have received one-eighth of one per cent. for collection, but in a majority of the cases we have received nothing.

Cross-examination by defendants:

Q. (By Mr. Van Santvoord.) Were you acquainted with A. F. Smith & Co. before they came to Oswego?

A. Yes, sir, I was; and have been acquainted with them ever since. I have been acquainted with the members composing the firm some ten years.

Q. Did they keep an account with your bank before they came to

Oswego from Cape Vincient, and thereafter, until their failure in October, 1869?

A. They did.

Q. Do you recollect, and if you do will you please state, the date of their failure in October, 1869?

A. I think it was the 16th of Oct.; it might have been the 15th. It was one day or the other. I now think it was the 15th.

Q. Do you know, and if so please state, what was the standing and credit of A. F. Smith & Co. prior to and down to their failure?

A. They enjoyed an enviable reputation and very high credit.

Q. Did any of the banks at Milwaukee, consigning cargoes of wheat by bills of lading with drafts drawn on A. F. Smith & Co., make any, and if any what, arrangement with your bank or with you for the payment by you of the freight on the cargoes of the vessels bound to Oswego?

A. Not any.

Q. Did the banks at Milwaukee, consigning cargoes by bill lading to you with drafts drawn on A. F. Smith & Co., put you in funds for the payment of freight on the cargoes, on arrival at Oswego, or for payment of insurance on the cargoes after the cargoes were discharged?

A. They did not.

Q. Was it the course of business of your bank, or of bankers generally receiving like consignments by bill lading with drafts drawn against the cargo, to make advances for freight on the cargoes?

A. It was not with us nor with other banks, as far as I know.

Q. Had you any interest in the business carried on by A. F. Smith & Co. at the Corn Exchange elevator, at Oswego?

A. None whatever.

Q. Was the firm of A. F. Smith & Co., the proprietors of the Corn Exchange elevator, the same A. F. Smith & Co. who were commission merchants and dealers in grain, doing business at the Corn Exchange elevator, and the persons upon whom drafts accompanying the bills of lading received from the Milwaukee banks were drawn?

A. They were; and they were known by me to be the same in 1868 and 1869.

Q. Did you ever see the original orders addressed to the captains, respectively, for the delivery of the cargoes of the vessels in question?

A. I don't recollect that I did.

Q. Will you look at the letter now shown you, of which "Exhibit N W, No. 1," is a copy, and state in whose handwriting that letter is?

A. It is in mine.

Said Exhibit N W, No. 1, is here read by defendants.

Redirect examination, (read by plaintiff:)

Q. Did you, in September and October, 1869, have more than one clerk in your employ by the name of Greenleaf?

145 A. I did not.

Q. Is he the same Greenleaf whose handwriting you have testified to?

A. Yes, sir.

N. WINSLOW.

Taken, subscribed, and sworn to before me, this 12th day of May, 1870.

ALFRED B. GETTY,
United States Commissioner.

Exhibit J. F. M., No. 1, A. B. G.

SEPT. 6TH, 1869.

PROPRIETORS OF CORN EXCHANGE ELEVATOR,
Oswego, New York:

DEAR SIRS: Please find enclosed an order for cargo schooner Kate Kelly for 8,727 bushels amber Milwaukee wheat, and 5,527 20-30 bushels No. 1 amber Milwaukee wheat, to be delivered to you, and you will please hold the same subject to and deliver the grain only on payment of the following draft, to wit:

W. P. McLaren & Co.	on	A. F. Smith & Co.,	st.	4,080 81	exg.
do	"	do	Oct. 5th,	7,500	"
do	"	do	" 20th,	7,500	"

Yours, respectfully,

J. F. MOFFATT,
Cashier.

Exhibit J. F. M., No. 2, A. B. G.

SEPT. 6TH, 1869.

PROPRIETORS CORN EXCHANGE ELEVATOR,
Oswego, New York:

DEAR SIRS: Please find enclosed an order to deliver to you 14,500 bushels of No. 1 amber Milwaukee wheat. This grain you are to hold subject to and delivered only on payment of the following drafts, to wit:

W. P. McLaren & Co.	on	A. F. Smith & Co.,	st.	$1,232 24	exg.
do	"	do	Oct. 16,	8,000	"
do	"	do	" 31,	8,000	"

Yours, very respectfully,

J. F. MOFFATT,
Cashier.

Exhibit J. F. M., No. 6, A. B. G.

OCT. 1ST, '69.

A. F. SMITH & CO.,
Proprietors Corn Exchange Elevator, Oswego, N. Y.

DEAR SIRS: I enclose herewith an order to deliver to you the cargo of schooner Corsican, of 13, 400 bush. No. 1 amber Mil. wheat, consigned to us by W. G. Fitch, cash., with instructions to hold the same until the following drafts are paid:

W. P. McLaren & Co.	on	A. F. Smith & Co.,	st.	$3,422 93	and exg.
do	"	do	Oct. 30,	6,600	"
do	"	do	No. 14,	6,600	"

Please hold for account accordingly.
Yours, truly,

J. F. MOFFATT,
Cash.

146 *Exhibit N. W., No. 1, A. B. G.*

NORRIS WINSLOW, *President.* J. F. MOFFATT, *Cash'r.*

MERCHANTS' BANK.
Watertown, N. Y., Oct. 15th, 1869.

Mess. DAVID DOWS & Co.

GENTS: Messrs. A. F. Smith & Co., of Oswego, N. Y., have given me an order on you for any margin due them on grain, or money advanced by them to you, &c.

Please inform me, if convenient, what amount there is likely to be due them from your house.

I sent the order to our correspondent, Messrs. Denny & Co., who has, I presume, ere this called on you.

Yours, very truly,

N. WINSLOW.

The plaintiff here read in evidence from the deposition of George I. Jones, taken at Milwaukee, 20th February, 1870, before Joseph Colt, as special commissioner, as follows:

GEORGE I. JONES, being duly sworn, deposes and says:

My name is George I. Jones; I am 34 years of age; I reside in Milwaukee, Wis.; I am of the firm of Geo. I. Jones & Co., general commission merchants, doing business in the city of Milwaukee, Wis. I was in the city of Oswego, N. Y., in the latter part of October, 1869. I was at the office of the Corn Exchange elevator, in that city with Mr. McLaren.

Q. Did you, with Mr. McLaren, examine the book or books of the Corn Exchange elevator, and if so, what book or books?

A. I examined, with Mr. McLaren, A. F. Smith & Co.'s canal bill-of-lading book.

Q. Did Mr. McLaren make any memoranda in your presence of any entries in the said book?

A. We did it together very carefully.

Q. After examining that book, were telegrams prepared and sent to the defendants. If yea, look at the papers now shown you, and state if they are the original drafts of telegram sent as aforesaid to the defendants.

A. They are.

Q. Did you take these originals to the telegraph office at Oswego, and cause them to be sent?

A. I did, and prepaid the charges.

Q. Did you go from the city of Oswego to New York City?

A. I did.

Q. Look at the telegram now shown you, and state whether you took that telegram to the telegraph office in Oswego, and directed it to be sent to David Dows, and paid the charges of transmission?

A. Yes, I did.

The plaintiff here read the telegram received by David Dows & Co., dated 22d October, 1869, produced by defendants on notice as follows:

Exhibit No. 4.—Jos. Colt, Special Commissioner.

DAVID DOWS & Co.,
New York City:

Three thousand and forty-seven (3,047) bushels wheat, shipped you from Oswego September eighteenth, (18th,) eighteen hundred and sixty-

nine, (1869,) on canal-boat Four Sisters, from schooner Kate
147 Kelly; and seventy-one hundred (7,100) bushels wheat shipped you from Oswego September 27th, (27th.) 1869, on canal-boat B. Hagaman; and seventy-eight hundred and thirty-six (7,836) bushels wheat, shipped you from Oswego October eighth, (8th,) eighteen hundred and sixty-nine, (1869,) on canal-boat Geo. Ames; and forty-three hundred and fifty-eight (4,358) bushels wheat, shipped you from Oswego same day, on canal-boat Anna Rebecca, from schooner Corsican, is the property of the National Exchange Bank of Milwaukee, which will hold you responsible for the same.

W. G. FITCH,
Cashier National Exchange Bank of Milwaukee.

Q. How soon after sending these dispatches before you left Oswego for New York City?

A. The same day.

Q. When did you arrive in New York City?

A. The following morning.

Q. Did you see the defendant, David Dows, in New York City on the morning of your arrival?

A. I did.

Q. Did you have any conversation with him that morning in relation to the wheat in question, and telegrams?

A. Yes.

Q. State what that conversation was.

A. Mr. Dows admitted the receipt of the dispatch referred to, and said he would notify us of the arrival of the wheat, and, on its arrival, point it out to us, provided we did not attempt to stop the wheat by replevin on the canal; and that, if he caused the wheat to be put in store, he would keep each boat-load separate, and identify it as the wheat coming out of those canal-boats, and would only require us to prove the identity of our wheat into said canal-boats. He said that in this he did not admit our right to the wheat.

The plaintiff's counsel here read in evidence the following memorandum of arrivals of wheat furnished the plaintiff's attorneys, Nov. 5, 1869, by David Dows & Co., the defendants, marked Exhibit L. B. W., No. 1, of which the following is a copy:

Memorandum of arrival of wheat shipped to David Dows & Co., New York, by and for account of A. F. Smith & Co., Oswego, N. Y., and advanced upon by David Dows & Co.

Date of arrival New York.	Name of boat.	No. of bush. per B. L.	
1869.			
Oct. 9	Four Sisters	3,047	Sold Oct. 11, 1869.
" 27	Hagaman	7,100	Store 7,070.25 bus.
Nov. 4	Anna Rebecca	4,358	Sold Nov. 4, 1869.
" 4	Geo. Ames	7,836	Afloat.

The plaintiff next put in evidence a demand on the defendants by Mr. Finch, the attorney for plaintiff, dated November 6, 1869, marked Exhibit L. B. W., No. 2, of which the following is a copy:

NEW YORK, *Nov. 6th*, 1869.

Messrs. DAVID DOWS & Co.,
New York City.

GENTLEMEN: Please take notice that the wheat received by you on or about the ninth day of October, 1869, from the canal-boat Four Sis-

ters, and also the wheat received by you from the canal-boat Hagaman (or B. Hagaman,) on or about the twenty-seventh day of October, 1869, and four thousand three hundred and fifty-eight bushels of wheat received by you from the canal-boat Anna Rebecca, on or about the fourth day of November, 1869, and the wheat received by you from the canal-boat George Ames, on or about the fourth day of November, A.
148 D. 1869, is the property of the National Exchange Bank of Milwaukee; and the said bank hereby demands from you the delivery and possession of said cargoes of wheat, and each of them, or on failure to deliver the same, said the National Exchange Bank of Milwaukee will hold you responsible for the value of the same with interest.

Respectfully, yours,

THE NATIONAL EXCHANGE BANK OF MILWAUKEE,
By H. M. FINCH,
Its Agent and Attorney.

It is admitted that Mr. Finch was properly authorized to send the telegram above referred to and to make this demand as the attorney of the plaintiff.

The plaintiff put in evidence the answer to the demand of Mr. Finch, dated New York, Nov. 6, 1869, marked Exhibit L. B. W., No. 3, as follows:

"If you are entitled to the wheat, and you will pay the freight and charges and our advances, and take care of the order to Winslow, we will account to you for the proceeds, but we don't know you in the matter.

"Yours, respectfully,

"DAVID DOWS & CO."

It was proved that the wheat was sold by the defendants, and that the rate at which the cargo of the Four Sisters was sold was $1.33 per bushel, without deducting freight or charges; that the rate at which the cargo of the Anna Rebecca was sold afloat was $1.37 per bushel, without deducting freight or charges; that the rate at which the cargo of the B. Hagaman was sold was $1.31 per bushel, without deducting freight or charges; and that the rate at which the cargo of the George Ames was sold was $1.34 per bushel, without deducting freight or charges.

Plaintiff rests.

GEORGE A. BENNETT, a witness called for the defendants, being duly sworn, testified as follows: I am a forwarding and shipping merchant, residing in Oswego in September and October, 1869, and agent of the canal-boats Four Sisters, B. Hagaman, George Ames, and Anna Rebecca.

A. Did you sign this bill of lading now produced and shown to you, marked by the stenographer Ex. L. B. W., April 18, 1872, No. 1, being bill of lading on boat Four Sisters, dated Oswego, Sept. 18, 1869?

A. I did, and delivered it to A. F. Smith & Co., from whom I took the property on board. The wheat mentioned came from the Corn Exchange elevator—(after looking at the paper)—I first sent the boat to the Columbia elevator, from which part of the wheat was received, but I finished loading at the Corn Exchange elevator on this boat Four Sisters. I also executed the bill of lading by the boat Hagaman,

produced and shown to me, (marked by the stenographer, L. B. W., April 18, 1872, No. 2,) and gave it to A. F. Smith & Co. I also executed the two bills of lading of the boats George Ames and Anna Rebecca, produced and shown to me, (marked by the stenographer Exhibit L. B. W., April 18, 1872, No. 3.) I gave them to A. F. Smith & Co. The bills of lading produced and shown to witness were B. L. of boat Four Sisters, dated Oswego, September 18, 1869; B. L. boat B. Hagaman, dated Oswego, September 27th, 1869; B. L. boat George Ames, dated Oswego, Oct. 8th, 1869, and B. L. Anna Rebecca, dated Oswego, Oct. 8, 1869.

The WITNESS. The grain mentioned in these several B. L.'s was on board of the boats at the time of the execution and delivery of these bills of lading.

149 JOHN AMERMAN was next called as a witness for the defendants, and being duly sworn, testified: I was the cashier of David Dows & Co. in Sept. and Oct., 1869. I know of the receipt from A. F. Smith & Co., by David Dows & Co., of the letter now shown me, dated Sept. 18, 1869; it was received on the morning of Sept. 20, 1869.

Q. What was the next document received?

A. The next document received was the draft of A. F. Smith & Co., with the B. L. (Ex. L. B. W., April 18, 1872, No. 1) and certificate of insurance attached, which was presented for payment.

Q. It came through what bank?

A. It came through the Fourth National Bank of New York. The draft was paid on presentment on the 20th September, 1869, and the B. L. and certificate of insurance were retained.

The following is a copy of the letter of A. F. Smith & Co., dated Sept. 18, 1869, received by D. D. & Co., Sept. 20, 1869, so far as relates to the shipment by the Four Sisters, and of the draft with the B. L. (Ex. L. B. W., April 18, 1872, No. 1) and certificate of insurance attached to the draft when it was presented for payment.

[Office of A. F. Smith & Co., proprietors of the Corn Exchange elevator, commission merchants for the sale of all kinds of State, Western, and Canada grain.]

OSWEGO, N. Y., *Sept.* 18, 1869.

Messrs. DAVID DOWS & Co., *New York.*

GENTLEMEN: We are shipping you, to-day, two loads No. 2 Mil. wheat, and draw as directed $1.29 per bushel. D'ft against 7,400 bushels. Boat Four Sisters, $9,546. The other load not completed yet. Please honor, and oblige,

Yours, truly,

A. F. SMITH & CO.

$9,546.] [No. 303.

A. F. SMITH & Co., COMMISSION MERCHANTS,
Oswego, N. Y., Sept. 18, 1869.

At sight pay to the order of B. Seaman, esq., cas., ninety-five hundred and forty-six dollars.

A. F. SMITH & CO.

To DAVID DOWS & Co., *New York.*

[U. S. revenue stamp, 2 cents, cancelled.]

Stamped on the face, "Paid, Sep. 20, 1869," and on the back, "Fourth National Bank, N. Y., paid."

OSWEGO, *Sept.* 18, 1869.

Shipped by A. F. Smith & Co., in apparent good order, on board canal-boat Four Sisters, of , Captain Whitney, the following-described property to be transported to the place of destination, without unnecessary delay, and delivered to the consignees in like good order, as noted below, in the customary manner, free of lighterage, upon payment of freight and charges as prescribed in this bill. Consignees to pay all harbor-towing from and to the usual place of landing. Three week-days, regardless of weather, after arrival and notice of same, to be allowed consignees to discharge this cargo, after which time the cargo or consignees are to pay demurrage at the rate of two per cent. per day upon the freight, (including tolls,) for each and every day of such demurrage over the three days, as above specified, until the 150 cargo is fully discharged. All damage caused by the boat or carrier, or deficiency in cargo, to be paid for by the carrier and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee. In case grain becomes heated while in transit the carrier shall deliver his entire cargo, and pay only for any deficiency, (caused by heating,) exceeding five bushels for each one thousand bushels.

The freight charges and demurrage payable to Sprague & Favill, or order, at place of destination, who is the agent of this captain and boat, and the only party authorized to collect the same, and whose receipt shall be in full of all demands on this cargo or bill of lading.

Act. A. F. Smith & Co., 7,400 bushels No. 2 Mil. wheat.

DAVID DOWS & Co., *New York.*

Freight hence to N. York eleven (11) cents per bushel.

G. A. BENNETT.

[U. S. rev. stamp, 5 c., cancelled.]

Certificate of insurance.

No. 5674.] INLAND MARINE DEPARTMENT,
ALBANY CITY INSURANCE COMPANY,
Oswego, Sept. 18, 1869.

This certifies that A. F. Smith & Co. insured, under and subject to the conditions of C Policy No. 173, issued by the Albany City Insurance Co., at the Oswego agency, in the sum of ten thousand four hundred dollars, on bushels of wheat, at $ per bushel, in board cargo of boat Four Sisters, to wit: $, at and from to , at per cent.; $10,400 at and from Oswego to New York, at per cent., is $36.40, which premium is hereby acknowledged to have been received. Loss (if any) payable to A. F. Smith & Co., or order hereon and return of this certificate.

Countersigned at Oswego this 18th day of Sept., 1869.

JAMES HENDRICK,
Vice-President.

A. F. SMITH & Co., *Agents.*

(Endorsed:) A. F. Smith & Co.

The above exhibits marked L. B. W., April 1, 1872, No. 1.

Q. Here is another letter of A. F. Smith & Co.; what is the date of it?

A. It is a letter of A. F. Smith & Co. to David Dows & Co., dated Sept. 27, 1869, received on the morning of the 29th Sept., 1869.

Q. What was the next receipt?

A. The next a draft and bill of lading that came on the 29th of September—the draft of A. F. Smith & Co.—through the Fourth National Bank of New York, accompanied by a bill of lading and certificate of insurance, the draft dated Sept. 27, 1869, the B. L. dated Sept. 27, 1869, (marked L. B. W., April 18, 1872, No. 2,) boat Hagaman. The draft was paid on presentment on Sept. 29, and the bill of lading and certificate of insurance retained.

The following is a copy of letter of A. F. Smith & Co., dated Sept. 27, 1869, received by D. D. & Co., 29th Sept., a. m., so far as relates to this shipment, and of the draft with bill of lading (Ex. L. B. W., April 18, 1872, No. 2) and certificate of insurance attached to the draft when presented for payment:

[Office of A. F. Smith & Co., proprietors of the Corn Exchange elevator, commission merchants for the sale of all kinds of State, Western, and Canada grain.]

OSWEGO, N. Y., *Sept. 27th*, 1869.

Messrs. DAVID DOWS & Co., *New York.*

151 GENTS: We received your dispatch saying, Can draw equal $1.35 in Milwaukee in New York. We are sending you load to-day of choice No. 1 Milwaukee, boat B. Hagaman; will send you more to-morrow, if can get time to load. What do you think about corn?

Yours, truly,

A. F. SMITH & CO.

$8,733.] [No. 324.

A. F. SMITH & Co., COMMISSION MERCHANTS,
Oswego, N. Y., Sept. 27th, 1869.

At sight, pay to the order of B. Seaman, cas., eighty-seven hundred and thirty-three dollars.

A. F. SMITH & CO.

To Messrs. DAVID DOWS & Co., *New York.*

[U. S. revenue stamp, 2c., cancelled.]

(Endorsed:) "Fourth National Bank, N. Y., paid;" stamped on face, "Paid Sept. 29, 1869."

OSWEGO, *September 27th*, 1869.

Shipped by A. F. Smith & Co., in apparent good order, on board canal-boat B. Hagaman, of Oswego, Captain Gage, the following-described property, to be transported to the place of destination without unnecessary delay, and delivered to the consignees in like good order, as noted below, in the customary manner, free of lighterage, upon payment of freight and charges as prescribed in this bill. Consignees to pay all harbor-towing from and to the usual place of landing. Three week-days, regardless of weather, after arrival and notice of same, to be allowed consignees to discharge this cargo, after which time the cargo

or consignees are to pay demurrage at the rate of two per cent. per day upon the freight (including tolls) for each and every day of such demurrage over the three days, as above specified, until the cargo is fully discharged. All damage caused by the boat or carrier, or deficiency in cargo, to be paid for by the carrier and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee. In case grain becomes heated while in transit, the carrier shall deliver his entire cargo, and pay only for any deficiency (caused by heating) exceeding five bushels for each one thousand bushels.

The freight charges and demurrage, payable to C. H. Gage & Co., or order, at place of destination, who is the agent of this captain and boat, and the only party authorized to collect the same, and whose receipt shall be in full of all demands on this cargo or bill of lading.

Messrs. David Dows & Co., 7,100 bus. No. 1 wheat,
New York. Milwaukee,
Acct. A. F. Smith & Co.
Freight to N. Y., twelve (12c.) per bushel.

G. A. BENNETT.

(Endorsed:) A. F. Smith & Co.

[U. S. revenue stamp, 5c., canc

Certificate of insurance.

No. 5681.] INLAND MARINE DEPARTMENT,
ALBANY CITY INSURANCE COMPANY,
Oswego, Sept. 27th, 1869.

This certifies that A. F. Smith & Co. insured under and subject to the conditions of canal policy No. 173, issued by the Albany City Insurance Company, at the Oswego agency, in the sum of ten thou-
152 sand six hundred dollars on bushels of wheat, at $ per bushel in board cargo of boat B. Hagaman, to wit, $, at and from to , at per cent.; $10,600 at and from Oswego to N. Y., at per cent. is $, which premium is hereby acknowledged to have been received. Loss (if any) payable to A. F. Smith & Co., or order hereon, and return of this certificates.

Countersigned at Oswego this 27th day of Sept., 1869.
A. F. SMITH & CO., *Agents.*
FORSYTH.

JAMES HENDRICKS,
Vice-President.

(Endorsed:) A. F. Smith & Co.

The above marked by stenographer L. B. W., Ap'l 18, '72. No. 2.

Q. What is this letter now produced and shown to you?

A. A letter of A. F. Smith & Co., dated Oct. 8, 1869, and received on the afternoon of the 9th Oct., 1869, advising of shipment by boat, Anna Rebecca and George Ames.

Q. What was the next document received?

A. Next came a draft of A. F. Smith & Co., through the Fourth National Bank, attached to the bill of lading, with a certificate of insurance for the boat George Ames, and a draft through the Ninth National Bank, with the bill of lading and certificate of insurance

attached of the boat Anna Rebecca. Both drafts were paid, and the bills of lading and certificates of insurance were retained. The draft against the bill of lading of the boat George Ames came on the 11th Oct., and on the same 11th day of Oct. came through the Ninth National Bank a sight-draft against the boat Anna Rebecca. There was a bill of lading and certificate of insurance attached to each draft. Both drafts were paid Oct. 11, 1869.

The following is a copy of the letter of A. F. Smith & Co. of Oct. 8, 1869, and of the draft of A. F. Smith & Co., dated Oct. 8, '69, on D. D. & Co., attached to bill of lading of boat George Ames and certificate of insurance, and of said bill of lading and certificate :

[Office of A. F. Smith & Co., proprietors of the Corn Exchange elevator, commission merchants for the sale of all kinds of State, Western, and Canada grain.]

OSWEGO, N. Y., *Oct.* 8, 1869.

Messrs. DAVID DOWS & Co.,
New York.

GENTS: Yours of the 6th and 7th rec'd. We tel. you to-day "letter rec'd." "We ship to-day 2 loads prime (1) Mil. wheat;" "draw sight, 25 less, $2,100 there;" have deducted freights, and we hope you will be able to realize good price for it on arrival, which may be retarded some by break in canal, but we hope not long. Markets here to-day quiet, but firmer tone.

Truly, yours,

A. F. SMITH & CO.

N. B.—Names of boats, Anna Rebecca and George Ames.

$6,284$\frac{52}{100}$.] [No. 342.

A. F. SMITH & Co., COMMISSION MERCHANTS,
Oswego, N. Y., Oct. 8, 1869.

At sight, pay to the order of B. Seaman, esq., cash., six thousand two hundred eighty-four $\frac{52}{100}$ dollars.

A. F. SMITH & CO.

To DAVID DOWS & Co.,
New York.

[U. S. int.-rev. stamp, 2 cents, cancelled.]

153 (Endorsed:) Fourth National Bank, N. Y. Paid.
(Stamped on face:) Paid Oct. 11, 1869.

OSWEGO, *Oct.* 8, 1869.

Shipped by A. F. Smith & Co., in apparent good order, on board canal-boat George Ames, of Oswego, Captain Watson, the following-described property, to be transported to the place of destination without unnecessary delay and delivered to the consignees in like good order, as noted below, in the customary manner, free of lighterage, upon payment of freight and charges, as prescribed in this bill. Consignees to pay all harbor-towing from and to the usual place of landing. Three week-days, regardless of weather, after arrival and notice of same, to be allowed consignees to discharge this cargo, after which time the cargo or consignees are to pay demurrage at the rate of two per cent. per day upon the freight (including tolls) for each and every day of such demurrage over the three days, as above specified, until the cargo is fully discharged.

All damage caused by the boat or carrier, or deficiency in cargo, to be paid for by the carrier, and deducted from the freight; and any excess in the cargo to be paid for to the carrier by the consignee. In case grain becomes heated while in transit, the carrier shall deliver his entire cargo, and pay only for any deficiency (caused by heating) exceeding five bushels for each one thousand bushels.

The freight, charges, and demurrage payable to Sprague & Favill, or order, at place of destination, who is the agent of this captain and boat, and the only party authorized to collect the same, and whose receipt shall be in full of all demands on this cargo or bill of lading.

Ac. A. F. Smith & Co., 7,836 bush. No. 1 Mil. wheat.
Care DAVID DOWS & Co.,
New York.

Fr't hence to N. York, 18c. per bush.

G. A. BENNETT.

(Endorsed:) A. F. Smith & Co.

[U. S. int.-rev. stamp, 5 cents.]

Certificate of insurance.

No. 5,688.] INLAND MARINE DEPARTMENT,
ALBANY CITY INSURANCE COMPANY,
Oswego, Oct. 8, 1869.

This certifies that A. F. Smith & Co. are insured, under and subject to the conditions of canal policy No. 173, issued by the Albany City Insurance Company, at the Oswego agency, in the sum of eleven thousand dollars, on 7,836 bushels of wheat, at $ per bushel. In board cargo of bt.Geo. Ames, to wit, $ at and from Oswego to New York, at per cent., $ at and from to at per cent., is 33\frac{06}{100}$, which premium is hereby acknowledged to have been received. Loss (if any) payable to A. F. Smith & Co., or order, hereon and return of this certificate.

Countersigned at Oswego this 8th day of October, 1869.

JAMES HENDRICKS,
Vice-President.

A. F. SMITH & Co., *Agent'.*

(Endorsed:) A. F. Smith & Co.

The following is a copy of the draft of A. F. Smith & Co., dated Oct. 8, 1869, on D. D. & Co., attached to B. L. of boat Anna Rebecca, and certifiate of insurance, and of said B. L. and certificate.

154 $7,700.] [No. 243.

A. F. SMITH & Co., COMMISSION MERCHANTS,
Oswego, N. Y., Oct. 8, 1869.

At sight, pay to the order of Jno. T. Hill, esq., cash'r, seventy-seven hundred dollars.

A. F. SMITH & CO.

To DAVID DOWS & Co.,
New York.

[U. S. int.-rev. stamp, 2 cents, cancelled.]

(Endorsed:) "Ninth National Bank, New York. Paid."

(Stamped on face:) "Paid Oct. 11, 1869."

OSWEGO, *Oct.* 8, 1869.

Shipped by A. F. Smith & Co., in apparent good order, on board canal-boat Anna Rebecca, of New York, Capt. , the following-described property, to be transported to the place of destination without unnecessary delay, and delivered to the consignees in like good order, as noted below, in the customary manner, free of lighterage, upon payment of freight and charges as prescribed in this bill. Consignees to pay all harbor-towing from and to the usual place of landing. Three week-days, regardless of weather, after arrival and notice of same, to be allowed consignees to discharge this cargo, after which time the cargo or consignees are to pay demurrage at the rate of two per cent. per day upon the freight (including tolls) for each and every day of such demurrage over the three days, as above specified, until the cargo is fully discharged. All damage caused by the boat or carrier, or deficiency in cargo, to be paid for by the carrier and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignees. In case grain becomes heated while in transit, the carrier shall deliver his entire cargo, and pay only for any deficiency (caused by heating) exceeding five bushels for each one thousand bushels. The freight charges and demurrage payable to Sprague and Favill, or order, at place of destination, who is the agent of this captain and boat, and the only party authorized to collect he same, and whose receipt shall be in full of all demands on this cargo or bill of lading.

Ac. of A. F. Smith & Co., 7,200 bush. No. 1 Mil. wheat.
Care DAVID DOWS & Co., *New York.*

Fr't hence to New York, 18c. per bush.

G. A. BENNETT.

(Endorsed:) A. F. Smith & Co.

Certificate of insurance.

No. 5689.] INLAND MARINE DEPARTMENT,
ALBANY CITY INSURANCE COMPANY,
Oswego, Oct. 8, 1869.

[U. S. int.-rev. stamp, 5 cents, cancelled.]

This certifies that A. F. Smith & Co. are insured under and subject to the conditions of canal policy No. 173, issued by the Albany City Insurance Company, at the Oswego agency, in the sum of ten thousand dollars, on 7,200 bushels of wheat, at $ per bushel.

In board cargo of bt. Anna Rebecca, to wit, at and from Oswego to New York, at per cent., $, at and from to , at per cent., is $45.00, which premium is hereby acknowledged to have been received. Loss (if any) payable to A. F. Smith & Co., or order hereon and return of this certificate.

Countersigned at Oswego this 8th day of Oct., 1869.

A. F. SMITH & Co., *Agent.*

JAMES HENDRICKS,
Vice-President.

155 (Endorsed:) A. F. Smith & Co.

The above drafts, B. L., &c., marked by stenographer L. B. W. April 18, '72, No. 3.

The defendants' counsel here offered to read in evidence the letters, or as much of them as advised, of the shipment and of the drawing of the drafts against the wheat shipped under each or any of the foregoing canal bills of lading in the name of A. F. Smith & Co., as the shippers, and for their account, to David Dows & Co., as consignees, and offered in evidence the several bills of lading, with certificate of insurance attached, and the draft drawn, which was paid on the delivery of the bill of lading for the wheat against which it was drawn, beginning with the bill of lading of the Four Sisters, dated Oswego, September 18, 1869; the certificate of insurance attached, and the sight-draft of A. F. Smith & Co., dated September 18, 1869, for $9,546, drawn against the wheat consigned by said B. L. to the defendants; the bill of lading showing shipment by the boat B. Hagaman, dated Oswego, September 27, 1869; the certificate of insurance attached, and the sight-draft of A. F. Smith & Co., dated September 27, 1869, for $8,733, drawn against the wheat consigned by said bill of lading to the defendants; the bill of lading showing shipment by the boat George Ames, dated Oswego, October 8, 1869; the certificate of insurance attached, and the sight draft of A. F. Smith & Co., dated October 8, 1869, for $6,284. $\frac{52}{100}$, drawn against the wheat consigned by said bill of lading to the defendants; and the bill of lading showing shipment by the boat Anna Rebecca, dated Oswego, October 8, 1869, certificate of insurance attached, and the sight-draft of A. F. Smith & Co., dated October 8, 1869, for [illegible]00, drawn against the wheat consigned by said bill of lading to de-

[illegible]ntiffs' counsel inquired for what purpose these bills of lading [illegible] drawn against them were offered in evidence.

[illegible]ENDANTS. For the purpose of showing title in the defendants a[illegible], by reason of advances made on consignments by bill of [illegible] the wheat shipped by A. F. Smith & Co. to the defendants, [illegible]ion with evidence that such advances were made in the usual [illegible] business, and bona fide, and without notice of any claim of [illegible]iffs, or of any other person, thereto, except A. F. Smith & Co.

[illegible]intiffs' counsel objected to the reception in evidence of any of [illegible] canal bills of lading for the purpose for which the same was

[illegible]s to the offer in evidence of the bill of lading of shipment by the [illegible]ters, and documents attached, he insisted—

[illegible]hat prior to the date of that bill of lading the plaintiff in this [illegible] acquired title to the wheat in question.

[illegible]hat the plaintiff had given no authority to the Merchants' Bank, [illegible]rtown, to deliver the wheat which went into this canal-boat from [illegible]schooner Kate Kelly, and to transfer or deliver to A. F. Smith [illegible]e title to the wheat, except upon the payment of all the drafts [illegible]l in the letter of the plaintiff, in evidence, to the Merchants'

[illegible]hat by the undisputed evidence, all the drafts thus enclosed to [illegible]rchants' Bank of Watertown had not been paid.

That the Merchants' Bank had never delivered to A. F. Smith & [illegible] wheat which went into the canal-boat Four Sisters from the Kate Kelly, under or by virtue of this alleged bill of lading.

5th. That this bill of lading purports to be a bill of lading of wheat shipped by A. F. Smith & Co.; but by the un[illegible]ed evidence in this case, A. F. Smith & Co. had no lawful right [illegible]hority to ship the wheat mentioned in that bill of lading.

[illegible] counsel for the plaintiffs insisted upon the like points as to the

offer in evidence of the B. L. of shipment by the boat B. Hagaman, and documents attached; also as to the offer in evidence of the B. L. of shipment by the boat George Ames, and documents attached; also as to the offer in evidence of the B. L. of shipment by the boat Anna Rebecca, and documents attached.

After a lengthy discussion by the counsel for plaintiffs upon the documentary and other evidence relied upon by the plaintiff in support of the foregoing propositions and arguments in support of the objection of the plaintiff, and the discussion by the defendants' counsel upon the construction and effect of the documentary evidence, and on the effect of the delivery of the wheat purchased for account A. F. Smith & Co. on board the lake-vessels at Milwaukee under the orders for the purchase, and the arrangement under which such shipment was made, and of the delivery to the Merchants' Bank, to transfer the title, and upon the circumstances attending and following the delivery of the wheat at the elevator of A. F. Smith & Co., and of the effect of the possession of A. F. Smith & Co. in their warehouse; coupled with an interest as the buyer or general or beneficial owner, or as security for their acceptances retained by the plaintiffs, as entitling the defendants as consignees on the shipment by A. F. Smith & Co. to them to a lien for their advances either at common law or under the New York act relating to principals and factors;

And further discussion of the evidence and argument in contravention of the claims, of fact and law, insisted upon by the plaintiff, and in opposition to the objections to the reception of the evidence offered, the judge ruled upon the objection as follows:

The COURT. You do not, of course, expect me to review, or even to examine, the various cases cited by the counsel upon this argument. I have listened to the comments made with great attention, and have endeavoured, as far as possible, to understand their effect, as applicable to this case.

My conclusion (and it is a conclusion which very properly may be the subject of review and more extended consideration on some future occasion, but which, nevertheless, the parties are entitled to require of me, if they choose so to insist in the progress of the trial, and when a very full, deliberate, and extended consideration cannot be given to the questions involved, however interesting or important they may be) is this:

That these plaintiffs did not lose their title to the wheat by the transactions which took place at Oswego. That McLaren & Co., when they made this purchase and paid for the goods with their own money, became the owners of the property. That they had the right to obtain the discount which they did upon the security of these bills of lading. That the proof shows, in fact, that such a procurement of discount was contemplated by all the parties in interest, or who expected to become interested in the wheat. That McLaren & Co. had a right, when they shipped the wheat, to impose such conditions upon its delivery to A. F. Smith & Co. as they saw fit. That with their concurrence the condition was imposed that the wheat should not be delivered until
157 these drafts were paid. That A. F. Smith & Co. received the grain into their elevator, or, to use the language of the orders, the "proprietors of the elevator" received the grain into the elevator with the knowledge that the delivery was not absolute; that it was not placed in their hands as owners, and that thereby they were not to acquire title. If they were not satisfied to accept the drafts upon those terms and conditions, they were quite at liberty to refuse them.

They were quite at liberty to say—and then was the time and place to say it—"We never authorized the purchase and shipment to us, or the drafts to be drawn upon us, accompanied by the condition that the wheat should not come into our hands and be under our complete control, on our acceptance of the drafts." That by making acceptance of the drafts, with that knowledge, they consented to receive this wheat, not as owners, or as purchasers; but they took it into their possession as warehousemen, and with no title to it whatever, except the right to pay the drafts, and so become invested with a legal title, and the further lien or right to charge the expenses of storage if they did not perform their contract, and the wheat was otherwise disposed of. That their act of shipment to New York was a fraud upon the plaintiffs and a fraud upon McLaren and Co.

That it is not a case within the factor's act. That Dows & Co., in accepting, did so at their own risk.

This in very brief terms embodies my conclusion, and the testimony offered is therefore excluded.

The defendants' counsel duly excepted to such exclusion of the testimony offered.

The defendants' counsel asked leave of the court to put in evidence the same documents for the purpose of showing a transfer to defendants of the title of A. F. Smith & Co. as the general owners, as bearing upon the question of the measure of damages.

The court ruled and decided that it would receive the evidence for the purpose of showing that the defendants have good title, as between themselves and A. F. Smith & Co., and as bearing upon the question of how much should be recovered as damages.

The defendants' counsel herein read in evidence so much of the letter, hereinabove set forth, of A. F. Smith & Co. to David Dows & Co., dated Oswego, Sept. 18, 1869, as advised of the shipping No. 2 Mil. wheat and drawing $1.29 per bush. draft against 7,400 bush., boat Four Sisters, $9,546, the other load not completed yet. Please honor and oblige."

The draft of A. F. Smith & Co., dated Sept. 18, 1869, at sight, on David Dows & Co. for $9,546, drawn against the consignment of this wheat by boat Four Sisters, (of which above is a copy,) and paid by David Dows & Co. Bill of lading above set forth, dated Sept. 18, 1869, of 7,400 bush. No. 2 Mil. wheat on boat Four Sisters, acc't A. F. Smith & Co., to David Dows & Co., New York, and the certificate of insurance attached, above set forth. All marked L. B. W., April 18, 1872, No. 1.

158 From letter of A. F. Smith & Co. to David Dows & Co., date Sept. 27, 1869: "We are sending you load to-day of choice No. 1 Milwaukee wheat, B. Hagaman; will send more to-morrow, if can get time to load."

The draft of A. F. Smith & Co., date Sept. 27, 1869, at sight, on David Dows & Co., for $8,733, drawn against the consignment of the wheat by boat B. Hagaman, (of which above is a copy,) paid by David Dows & Co. Bill of lading above set forth, date Sept. 27, 1869, of 7,100 bushels wheat on boat B. Hagaman, consigned to David Dows & Co., New York, acc't A. F. Smith & Co., and certificate of insurance attached, above set forth, all marked L. B. W., Ap'l 18, '72, No. 2.

The letter of A. F. Smith & Co. to David Dows & Co., date Oct. 8, '69, advising of shipments of boats Anna Rebecca and George Ames. Draft A. F. Smith & Co., date Oct. 8, '69, on David Dows & Co., for $6,284$\frac{52}{100}$, drawn against the consignment of wheat by boat George Ames, (a copy above set forth,) and paid by David Dows & Co. Bill of

lading above set forth, date Oct. 8, '69, of 7,836 bush. No. 1 Mil. wheat, boat George Ames, acc't A. F. Smith & Co., care David Dows & Co., New York, and certificate of insurance attached, above set forth. The draft of A. F. Smith & Co., date Oct. 8, '69, on David Dows & Co., for $7,700, drawn against consignment of wheat by boat Anna Rebecca, (copy above,) and paid by David Dows & Co. Bill of lading set forth, date Oct. 8, '69, for 7,200 bush. No. 1 Mil. wheat, in boat Anna Rebecca, acc't A. F. Smith & Co., care David Dows & Co., New York, and the certificate of insurance attached, above set forth, all marked L. B. W., Ap'l 18, '72, No. 3.

The above read, with the testimony of John Amerman in respect thereto.

ALEXANDER E. ORR, one of the defendants, being called as a witness and sworn, testified: I am now and was in the fall of 1869 one of the firm of David Dows & Co. I remember the transaction of the advances made by our house upon wheat by the four canal-boats which have been mentioned.

Q. What knowledge, if any, had you, at the time you made these advances, of any other persons having any interest in those cargoes besides A. F. Smith Co.?

(The plaintiffs object, as calling for irrelevant and incompetent evidence, and because it is immaterial to the issue in this case.

The DEFENDANTS' COUNSEL. We offer to show by this witness that the advances were made in good faith without any knowledge, notice, or suspicion on the part of the defendants that any other persons besides A. F. Smith & Co. had any property or interest, of any kind in any portion of the cargoes.

The COURT. Do the plaintiffs propose to make any claim in this case that the contrary is true?

The PLAINTIFFS' COUNSEL. Not outside the correspondence between A. F. Smith & Co. and David Dows & Co.

The COURT. I reject the evidence offered, and do it because *that* if the views I have already expressed shall govern and determine in this case, they proceed upon the assumption that these defendants acted bona fide, without knowledge or notice of anything to put them upon inquiry touching this matter; therefore it is useless to spend time in offering this testimony. The good faith of the defendants will be assumed.

159 PLAINTIFFS' COUNSEL. We so insist.

DEFENDANTS' COUNSEL. We are bound to offer it in order to keep our record straight; we therefore except to the exclusion of the testimony.)

Q. Have you the means of stating when the cargo of the Four Sisters was received and sold by you?

A. Yes, sir.

Q. Give the date.

A. It was received and sold on or about the 7th or 8th of October, 1869, about ten or twelve days before we heard of the failure of A. F. Smith & Co., or of any claim of any parties. I think it was twelve days.

Q. Did you hear of any claim of any party to this wheat until after the failure of A. F. Smith & Co.?

A. No, sir.

Q. Or to any portion of the cargoes?

A. No, sir; not until twelve or fourteen days after we had received and sold the cargo of the Four Sisters. The telegraphic dispatch which

has been put in evidence was the first information we had upon the subject of there being any other claim.

Q. What charges did you pay upon the cargo of the Four Sisters?

(Plaintiff objects to the question on the ground that the plaintiffs were entitled to this wheat, and were the owners of it at Oswego; that the movement of the wheat from Oswego to New York was adverse them, and they are not to be charged with the expense thereof.

DEFENDANTS' COUNSEL. The only evidence of damage which the plaintiffs have given is the gross proceeds of the sale in the city of New York. We suppose that if they are entitled to anything at all, that it is the net rather than *to* the gross proceeds.

The COURT. I sustain the objection, and exclude the testimony.

The defendants' counsel excepted.)

Q. Can you tell what the net proceeds of the cargo of the Four Sisters was?

(Like objection, ruling, and exception.)

(DEFENDANTS' COUNSEL. We offer the same testimony in relation to the cargoes of the three other canal-boats, namely, the B. Hagaman, the George Ames, and the Anna Rebecca, to show the expenses, freight, &c., paid upon each, and the amount of the net proceeds as distinguished from the gross proceeds proved by the plaintiff.

Like objection, ruling, and exception.)

Q. Were the several B. L.'s by these four canal-boats in the ordinary form of commercial B. L.'s received from the West for grain, where the property is shipped by the owners?

(Plaintiff objects as calling for testimony that is irrelevant, incompetent, and immaterial to the issue in this cause. Objection sustained.

Exception taken by defendant.)

Q. Look at the two papers now shown to you, and state if you identify them.

A. I do identify them.

DEFENDANTS' COUNSEL. We offer in evidence the papers identified by the witness, viz: an order from A. F. Smith & Co., dated October 14, 1869, on David Dows & Co., in favor of Norris Winslow, banker, Watertown, for balances from wheat consigned to David Dows & Co., by A. F. Smith & Co., of which a copy was produced, referred to
160 in the answer of David Dows & Co. to the demand of the plaintiffs on them of November 6, 1869; and a letter from the Merchants' Bank, Watertown, confirming the same, as a justification of the answer to each demand and of the refusal therein.

Q. (By plaintiffs' counsel.) Do you know this to be a copy of the order?

A. Yes.

(The plaintiff's counsel objected to the reception of the order and letter as calling for testimony that is irrelevant, incompetent, and immaterial to the issue in this cause.

Objection sustained.

Exception taken by defendants.)

The following are copies of the order of A. F. Smith & Co., and of the letter of Merchants' Bank:

The order marked Ex. L. B. W., April 18, '72, *No.* 4.

To D. Dows, Esq., *N. Y.:*

Please pay to the order of Norris Winslow, banker, of Watertown, whatever amount of moneys may remain in your hands, or that may

come to your hands hereafter from sales of wheat consigned to you by us over and above the amount for which you have accepted or paid for us as advances on such wheat, including your coms. and charges, and also all margins deposited by us with you which may remain after your advances and coms. shall have been paid.

A. F. SMITH & CO.

OSWEGO, *Oct.* 14*th*, '69.

Held by Thomas Denny & Co., 39 Wall street.

The following is a copy of the letter of the Merchants' Bank, marked L. B. W., April 18, '72, No. 5:

NORRIS WINSLOW, *President.* J. F. MOFFITT, *Cashier.*

MERCHANTS' BANK,
Watertown, N. Y., Oct. 15, 1869.

Messrs. DAVID DOWS & Co.

GENTS: Messrs. A. F. Smith & Co., of Oswego, N. Y., have given me an order on you for any margin due them on grain or money advanced by them to you, &c.

Please inform me, if convenient, what amount there is likely to be due them per your house.

I sent the order to our correspondent, Messrs. Denny & Co., who has, I presume, ere this called on you.

Yours, very truly,

N. WINSLOW.

Defendant read from the deposition of David Mannering, taken before Commissioner Getty, at Oswego, April 30, '70, as follows:

DAVID MANNERING, having been duly sworn as aforesaid, did depose and say as follows: I reside in Oswego, about three hundred miles from New York City; my age is fifty-two years; my occupation in September and October, 1869, was cashier of the City Bank of Oswego.

The defendants then offered to read the answer of this witness in his deposition as to the character and uses of the elevating warehouses in Oswego, the business of A. F. Smith & Co., and the purposes for which they, as proprietors of the Corn Exchange elevator, used that elevator, as follows:

161 Q. How long have you resided in Oswego?

A. About nineteen years, and know this is a lake port at the mouth of the Oswego River.

Q. How large a portion of the business of Oswego consists of the receipt of grain purchased at the West, or in Canada, for sale at Oswego, or on commission, or for shipment from Oswego?

A. I think the grain business is the largest business done in Oswego.

Q. By whom and what class of merchants is that business done?

A. By commission merchants.

Q. In the transaction of that business by commission merchants, are they generally possessed of a warehouse, with an elevator to take the grain from vessels into the warehouse?

A. Most of them are.

Q. Are not the number of warehouses with an elevator, in which commission merchants at Oswego do their business, a peculiar feature of Oswego as a lake port?

A. I think it is.

Q. In reference to the quantity of wheat received on sale on commission or for shipment, how does Oswego rank with other lake ports?

A. Oswego ranks first on Lake Ontario, and next to Buffalo in this State.

Q. How many of those elevating warehouses are there in Oswego?

A. I should think there are ten or twelve. They are mostly on the east side of the river. There is one grain-elevator on the west side of the river.

Q. Have all these elevating warehouses some name?

A. Yes, sir.

Q. Are there any of these elevating warehouses at Oswego used exclusively for the receipt of grain for storage?

A. No, sir; I don't know of any.

Q. How long have you known the firm of A. F. Smith & Co.?

A. Two years and since they came to Oswego.

Q. Have they kept an account at your bank?

A. Yes, sir.

Q. What was their business during these two years?

A. They were commission merchants and grain-dealers, like the rest of those elevator-men.

Q. Was the Corn Exchange elevator, the one used and occupied by A. F. Smith & Co., one such as you have described?

A. Yes, sir; they were proprietors of the Corn Exchange elevator, whether owners or not I do not know, but they were the sole occupants, and they did their business at that elevator.

This was offered for the purpose of ascertaining and helping to interpret the arrangement or orders for the delivery of the wheat at the Corn Exchange elevator.

The plaintiff's counsel objected to the reading of this evidence, for the reason that the same is irrelevant and incompetent evidence for such purpose.

The judge sustained the objection and excluded it, and the defendants excepted.

The defendants further offered to read in evidence from the deposition of this witness as follows:

Q. In 1868 and 1869, did you receive consignments by bills of lading, for account of any other banks in Milwaukee, or other western
162 banks, with drafts enclosed, drawn on other commission houses at Oswego than A. F. Smith & Co.?

A. Yes, sir; we did.

Q. In those cases, did or did not the wheat, on arrival at Oswego, go into the elevating warehouse, or through the elevator of the parties on whom the drafts were drawn, after acceptance of the drafts?

A. Yes, sir; it did, when they had a warehouse.

Q. Was that the general usage at Oswego in cases of consignments by bill of lading, with drafts attached, to banks at Oswego?

A. Yes, sir; I think it is, and was at that time.

Q. How long has the usage prevailed in Oswego of ordering wheat, on arrival at Oswego, in the elevating warehouse of the merchant upon whom the drafts were drawn, if he had one?

A. I have no recollection of its being anything different since I can remember; some fifteen or sixteen years.

This was offered as evidence of the general usage at Oswego in cases of consignment by B. L., with drafts attached, to banks at Oswego, to

place the wheat on arrival at Oswego in elevating warehouse of the commission merchant or dealer in grain on whom the drafts were drawn, after acceptance of the drafts, as bearing upon the question of the authority of the Watertown Bank to order the delivery of the wheat in question into the Corn Exchange elevator of A. F. Smith & Co., and of the purpose for which it was so ordered; and for ascertaining the meaning and helping to interpret the meaning of the orders for the delivery of the wheat into the Corn Exchange elevator.

The plaintiffs objected to this evidence as incompetent and irrelevant.

The judge excluded the evidence, and defendants excepted to the ruling.

The defendants offered the answers to the following questions in evidence:

Q. Had the transactions of A. F. Smith & Co., before their stoppage, in wheat been large?

A. Yes, sir; they had.

Q. Down to the time of their stoppage, how did their credit stand at Oswego and with your bank?

A. It was good.

The plaintiffs objected to this evidence.

The judge excluded it.

Defendants excepted.

The testimony was here closed.

The counsel for the defendants presented to the court the following requests:

1. Defendants ask to go to the jury upon the question whether, upon the evidence, the arrangement between A. F. Smith & Co. and McLaren & Co., for the purchase of the wheat in question, was not that A. F. Smith & Co. should have credit for the whole cost, except such portion as was to be paid for by sight-drafts, and be entitled to the possession and absolute ownership on payment of such sight-drafts and acceptance of the time-drafts, drawn for the residue of the cost; and they request the court to instruct the jury that, if such was the arrangement, the defendants are entitled to a verdict.

2. Defendants ask to go to the jury on the question whether, on the evidence, the arrangement between A. F. Smith & Co. and McLaren & Co. was not that the wheat in question was to be bought for and on account of A. F. Smith & Co., with power only on the part of
163 McLaren & Co. to pledge the same so far as might be necessary to procure the means of payment by discount of the bills to be drawn for the cost; and defendants request the court to charge the jury that if such was the arrangement, the general property in the wheat was in A. F. Smith & Co., subject only to the lien as special property of the plaintiff as pledgees.

3. Defendants request the court to instruct the jury that if the general property in the wheat was in A. F. Smith & Co., and they had the actual possession of the same, though such possession was without the consent of the plaintiff, the defendants making advances to A. F. Smith & Co., on the faith of their possession and of the canal-boat bills of lading in evidence, bona fide, and without notice of any interest in the plaintiffs, acquired a property in the wheat, which is a defence to this action.

4. The defendants ask to go to the jury upon the question whether upon the evidence it was not the arrangement between the plaintiffs

and the Merchants' Bank that the latter might, on guaranteeing the payment of the drafts, allow the wheat to go into the possession of A. F. Smith & Co.; and defendants request the court to charge that if such was the arrangement, though the possession so obtained by A. F. Smith & Co. was charged with the condition that he should pay the drafts, the defendants making advances to A. F. Smith & Co., on the faith of their possession, and of the canal-boat bill of lading in evidence, bona fide, and without notice of any interest in the plaintiff, acquired a property in the wheat, which is a defence to this action.

5. The defendants request the court to instruct the jury that they cannot find a verdict against the defendants in respect to the 4,358 bushels claimed as part of the cargo of the canal-boat Anna Rebecca, for any larger part of that amount than they are satisfied from the evidence is from the same wheat that was brought to the elevator by the schooner Corsican.

6. That plaintiffs are not entitled in any case to recover an amount exceeding their unpaid and beneficial interest in the several cargoes.

7. That they can only recover, in respect to the several parcels in the four canal-boats mentioned in the declaration, such a percentage of the wheat in said boats in which they established an interest, as the amount of their unpaid bills of exchange bear to the total cost at Oswego (including freight and charges) of the several cargoes.

8. That the defendants as consignees of the cargo of canal-boat Four Sisters, by bill of lading, in the name and for account of A. F. Smith & Co., acquired a lien thereon for the advance thereon, if made in good faith, and without notice of any interest or claim of the plaintiff or other parties which would entitle them to retain that cargo against any claim of the plaintiff.

Same as to cargo of B. Hagerman.

Same as to cargo of boat Anna Rebecca.

Same as to cargo of boat George Ames.

As to each of these boat-loads separately—

9. *a.* That the question whether the wheat bought at Milwaukee for account A. F. Smith and Co., and shipped by the purchasing agent there on the Kate Kelly, was shipped with the view of passing the property to A. F. Smith & Co., is a question of fact for the jury to determine, and also the question whether on such shipment, under the circumstances, there was any intention on the part of the purchasing agent to reserve any interest beyond a mere right of retention for the payment of the drafts drawn against it, and we ask the judge to instruct the jury,

if the intention to be collected from the evidence was to pass the
164 property to A. F. Smith & Co., on the shipment in fulfilment of the order for the purchase and without the intention of reserving any other interest than a mere lien or right of retention for the payment of the drafts, the only interest of the purchasing agent or of the plaintiff as pledgees of the lake bill of lading was that of their lien or right of detention, the preservation of which would depend upon retaining the possession.

b. Same as to Grenada.

c. Same as to Corsican.

10. That the question whether the bank at Watertown was authorized to deliver the cargo consigned to it by the Milwaukee Bank to A. F. Smith & Co. is a question for the jury, upon the evidence appertaining thereto, including the correspondence between the two banks in respect to consignments, and should be submitted to them.

11. And also the question whether on the evidence the receipt by A.

F. Smith & Co. of the wheat, for their account, as per the entries in the tally-books and grain-books of the elevator, given in evidence by the plaintiffs, was not authorized by the Watertown Bank.

12. And also the question whether the shipment by A. F. Smith & Co., for advances, was not to be considered as made by the permission and license of the Watertown Bank.

Same as to wheat by each of canal-boats.

13. That if they should find that the wheat was held by A. F. Smith and Co., for their account, by the consent or authority of the Watertown Bank, at the time of the shipment of any of the parcels of wheat consigned to the defendants, although charged with some trust for the payment of drafts against it, the defendants, as holders under the canal bills of lading, would acquire a title to the wheat by their advance on the consignment by bill of lading made upon transfer of the canal bill, if bona fide, and such title would be valid as against the plaintiffs.

14. We ask the judge to instruct the jury upon the evidence that the defendants as bona fide purchasers, by reason of their advance on the canal bills of lading, acquired a valid title to the wheat covered by such bills against the claim of the plaintiffs.

As to damages: The claim of the plaintiffs, if entitled to any recovery, would be limited to their interest for amount unpaid drafts, not exceeding the value of any particular parcel.

16. And the amount due in respect to any particular cargo should be pro-rated.

17. The wheat claimed by boat Four Sisters, having been sold and disposed of by the defendants before any notice or claim on behalf of the plaintiffs, and before any demand made by the plaintiff, the defendants are not liable as for a conversion therefor.

The COURT. I recognize the general principle that questions of fact are questions for the jury, under such instructions as the court may think proper to give upon the facts or the uncontradicted evidence. The view I take as to effect of the evidence has been somewhat briefly stated, and will be found in the instructions which I shall give to the jury. Perhaps that is all that is necessary for me to say on the question whether or not the plaintiffs are entitled to recover in respect of all the wheat which came to the defendants in the Anna Rebecca. I understand that counsel claim that there is some conflict of testimony, and, if so, that question should be submitted to the jury for their consideration. Under the intimation of the court, that the summing
165 up should be confined to the question of the identity of the wheat claimed on board each of the several canal-boats, with the wheat on the lake vessels, covered by the lake bills of lading, under which the plaintiff claims, and the amount of damages which the plaintiff might be entitled to recover, the cause was summed up by the counsel for the defendant and counsel for plaintiff.

The counsel for the plaintiff presenting his claim as follows:

If the jury finds, from the evidence, that the wheat on board the schooners Kate Kelly, Grenada, and Corsica, came to the possession of the defendants, through the canal-boats George Ames, Anna Rebecca, Hagamen, and Four Sisters, to the extent which the plaintiff claims, the plaintiff is entitled to recover to the extent of the unpaid drafts for said wheat in such canal-boats, the price realized therefor, with interest from November 6th, 1869, the date of the demand on the defendants.

The precise claim of the plaintiffs is as follows:

It holds an unpaid draft for $7,500.00 against the cargo of the Kate Kelly, which amounted to 14,254 26/60 bushels, of which 3,047 10/60 bushels went on board the canal-boat Four Sisters, and for which the defendants realized	$4,052 73
It holds an unpaid draft for	16,000 00
against the cargo of the Grenada, which amounted to 14,500 bushels, of which 7,100 bushels went on board the canal-boat Hagaman, and for which defendants realized.	9,301 00
It holds two unpaid drafts for $6,600 each, *i e*	13,200 00
against the cargo of the Corsican, amounting to 13,400 bushels, of which 7,836 bushels went on board the canal-boat George Ames, and 4,358 27/60 bushels went on board the canal-boat Anna Rebecca, and *for* which the defendants sold for	16,495 07
or $3,295.07 more than the unpaid drafts.	

RESUMÉ.

Four Sisters	$4,052 73
Hagaman	9,301 00
Anna Rebecca and George Ames	12,200 00
	$26,553 73
Interest 2 years, 115 days	4,557 78
	$31,111 51

His Honor Judge WOODRUFF charged the jury as follows:

GENTLEMEN OF THE JURY: I have but little to say to you in this case. The questions of fact involved in this controversy are properly for your determination. That is the rule which governs the conduct of all trials in this court. It is, at the same time, the duty of the court to state to you the rules of law applicable to facts that stand proved without contradiction; and it is your duty to regard those rules in their application to the case, as it is also your duty to determine any material questions which stand before you upon evidence of either doubtful meaning or in respect to which there is conflict of evidence.

I expressed myself in the course of this trial, after the discussion of the admissibility of certain evidence, very fully in regard to the legal effect of certain facts which are shown by documentary and other evidence, in relation to which there is no conflict, and the verity of which the defendants do not seek to impeach. Those facts are,
166 in the main, these: that W. P. McLaren & Company, of Milwaukee, under an order to purchase wheat, given by A. F. Smith & Co., of Oswego, purchased at Milwaukee three cargoes of wheat, which were shipped at that port in the vessels called the Kate Kelly, the Grenada, and the Corsican; that that firm paid for the wheat themselves; that they procured from the plaintiffs a discount of drafts drawn upon A. F. Smith & Co., to cover the amount of the purchase-money and charges; and that the plaintiffs received from McLaren & Company the several bills of lading of the shipment as security to themselves on making the discount. I understand the proof given by the cashier, Fitch, and by McLaren, to show that there was an understanding between McLaren & Company and the plaintiff that the wheat thus purchased and shipped

should go forward under instructions that it be not delivered to A. F. Smith & Co. until the drafts drawn against the respective shipments were paid; that in pursuance of that arrangement, the several bills of lading given by the masters of the respective vessels were endorsed by the plaintiffs to the Merchants' Bank of Watertown, with special instructions thereon not to deliver the wheat until the said several drafts drawn against the shipments respectively were paid; that the Merchants' Bank at Watertown received the drafts and received the bills of lading, and, if I am not mistaken in my recollection, some further advice than the endorsements on the bills of lading embodying the same instructions contained in those endorsements (if I am wrong, the counsel will be kind enough now to name it to me) to the like effect, that the wheat was not to be delivered until the drafts were paid; that receiving the drafts and bills of lading, and the instructions to which I have referred, the Merchants' Bank caused the drafts to be presented, I think, by a direct transmission to A. F. Smith & Co., by letter, for payment, as to the sight-drafts, and acceptance as to those which were drawn on time, stating in substance in the letter that they enclosed with the drafts an order for the delivery of the wheat, describing it, as consigned to them by W. G. Fitch, with instructions to hold the same until the drafts, referring to the particular shipments and enumerating them, were paid, and with a request to hold the wheat for account accordingly. One letter is addressed to "A. F. Smith & Co., proprietors of the Corn Exchange elevator," and the other two are addressed simply to the "Proprietors of the Corn Exchange elevator." The letters are in the words following:

"SEPT. 6TH, '69.

"PROPRIETORS OF CORN EXCHANGE ELEVATOR, *Oswego, N. Y.*

"DEAR SIRS: Please find enclosed an order for cargo schooner Kate Kelly, for 5,727 bushels amber Milwaukee wheat, and 5,527 20–60 bush. No. 1 amber Milwaukee wheat, to be delivered to you, and you will please hold the same subject to and deliver the grain only on payment of the following draft, to wit:

"W. P. McLaren & Co.,	ac.	A. F. Smith & Co.,	st.	$4,080 81 exg
"	"	Oct. 5th,		7,500
"	"	" 20th,		7,500

"Yours, resp'y,

"J. F. MOFFATT, *Cash'r.*"

"SEPT. 15TH, 1869.

"PROPRIETORS OF CORN EXCHANGE ELEVATOR, *Oswego, N. Y.*

"DEAR SIRS: Please find enclosed an order to deliver to you
167 14,500 bush. of No. 1 amber Milwaukee wheat. This grain you are to hold subject to and delivered only on payment of the following drafts, to wit:

"W. P. McLaren & Co.,	ac.	A. F. Smith & Co.,	st.	$1,232 24 exg.
"	"	Oct. 16,		8,000
"	"	" 31,		8,000

"Yours, very resp'y,

"J. F. MOFFATT, *Cash'r.*"

"OCT. 1ST, '69.

"A. F. SMITH & CO.,

"*Proprietors of Corn Exchange Elevator, Oswego, N. Y.*

DEAR SIRS: I enclose herewith an order to deliver to you the cargo of schooner Corsican, of 13,400 bush. No. 1 amber Mil. wheat, consigned to us by W. G. Fitch, cash., with instructions to hold the same until the following drafts are paid:

"W. P. McLaren & Co. on A. F. Smith & Co., st., $3,422 92 and exg.
"Do. do. do. Oct. 30, 6,600 00 and exg.
"Do. do. do. Nov. 14, 6,600 00 and exg.

"Please hold for account accordingly.

"Yours, truly,

"J. F. MOFFITT, *Cashier.*"

The court has expressed the opinion that upon these facts the plaintiffs retained the interest in the wheat which was secured to them by the transaction between them and McLaren & Company, and that it was not lost by its going, under these advices, into the Corn Exchange elevator at Oswego, and that upon these facts a subsequent shipment by A. F. Smith & Co., without the knowledge or consent of these plaintiffs or their agents, the Merchants' Bank at Watertown, did not divest the plaintiffs' title, and did not confer upon their consignee in New York, these defendants, an interest in the wheat adverse to the plaintiffs.

These views lead them to the inquiry, in respect to which the counsel have addressed you: Did A. F. Smith & Co. ship the wheat upon which the plaintiffs made these advances to Dows & Co., and did Dows & Co. receive and sell the wheat?

The proposition of law upon which instructions have been asked by the defendants, and which is in general terms, that the plaintiff has no claim upon these defendants, except so far as they identify the wheat and trace it into the defendants' hands, is unquestionable. The counsel who opened the case on the part of the defendants made no question, and stated that they should make no question in regard to that portion of the wheat which is claimed by the plaintiffs to have come from the cargo of the Kate Kelly.

COUNSEL FOR THE DEFENDANT. That was an inadvertant concession.

The COURT. An inadvertant concession of that kind is not to be held conclusive, and at any time during the progress of the trial the defendant is at liberty to change his ground in that respect, if, upon reflection and examination of the testimony, he supposed that the fact was in doubt, and that there was fair ground for debate. I only repeat the general proposition that I have already given to you, when I say substantially, at least, in the terms of the request, that the jury cannot find a verdict against the defendants in respect to the 4,358 bushels of wheat claimed as a part of the cargo of the canal-boat Anna Rebecca, for any larger part of that quantity than the jury are satisfied from the evidence is of the same wheat that was brought to the elevator by the schooner Corsican. That is simply a reiteration in its application
168 to that particular shipment by the Anna Rebecca, which I have said, in general terms, is applicable to the whole of the wheat claimed to be part of the cargoes shipped from Milwaukee.

I shall not recite the evidence that bears upon the subject. I will say in regard to a case of this sort, that the existence of the occasion for such a controversy is painful. As I have heretofore said, and have

assumed, and I desire to say that I shall assume, these defendants have acted with entire good faith in respect to the shipments made to them, and in the advances which they have made upon these cargoes. And I need not add that it is hard, hard in the ordinary language of mankind, that, acting with honesty, with integrity, and with fairness, and, as they supposed, safety, they have been placed in peril of loss.

On the other hand, it is not questioned that the plaintiffs acted in like good faith, and it is not even denied that they acted according to the ordinary course of business, in advancing their money and in obtaining what they conceived to be perfect security, at least to the extent of the value of the property. I say that a controversy like this is painful, because the loss that results must fall upon one or another, with whose conduct in the transaction no fault can be found; and yet, gentlemen, the affairs of human life, and the relative rights and duties of parties in those affairs are to be determined by law, they must be determined by rule, or there is no safety in anything, and according to the application of the rules of law governing a transaction of this sort, the loss must fall on the one or the other. All business is done in subordination to those rules, and, at whatever hazard, is necessarily involved in the nature of the business. The hazard here, on the one hand, has been a hazard that, with all the precautions the plaintiffs took to follow the wheat with bills of lading and instructions, specific and definite, they might be betrayed in their confidence. And, on the other hand, that with all the precautions which the defendants deemed it fitting to take, and acting with entire fairness they deemed it necessary to take, they, if the loss is to fall upon them, have been betrayed. The transaction has operated as a fraud by A. F. Smith upon them; so that the case comes very largely, if not precisely, to the views that were read to you by counsel from some of the books here, that parties necessarily in most of the transactions of human life have to depend upon their confidence in the parties with whom they deal.

I say, gentlemen, that I do not propose to review the evidence. If you find that the cargo of the Four Sisters came out of the cargo of the Kate Kelly, then the plaintiffs' rights in that re'pect stand just where they do in relation to the cargo of the Hagaman, about the identity of which counsel for the defendant make no claim of doubt. And so also as to the cargo of the Anna Rebecca, of 4,358 and 2,700 bushels. The counsel on both sides have called your attention to documents and testimony. On the one hand it is claimed that they have created such a doubt that, under a just rule, that where defendants are to suffer injustice, the jury are to be satisfied that the plaintiff has proved the case which he seeks to establish. I say the defendants have claimed that they have thrown, at least, such doubt about it as that you ought to find a verdict in their favor. On the other hand, the plaintiff's counsel have claimed, by reference to documents which he shows were contemporaneous, and coupling them as he does with some reference to testimony, that he has made it so plain that the cargo of the Anna Rebecca came out of the Corsican, as well as the cargo of the Four Sisters from the Kate Kelly, that you ought not for a moment to hesitate.

169 Now as to the measure of recovery, I have adopted a rule most favorable to the defendants. It may be that the facts are such that the favor is not large; perhaps not. But I have, as a rule, held, and I instruct you that the plaintiffs, to the extent only of their interest in each cargo, can claim indemnity, so that if in a cargo sold by the defendants the interest of the plaintiff in that particular cargo is less

"OCT. 1ST, '69.

"A. F. SMITH & Co.,

"*Proprietors of Corn Exchange Elevator, Oswego, N. Y.*

DEAR SIRS: I enclose herewith an order to deliver to you the cargo of schooner Corsican, of 13,400 bush. No. 1 amber Mil. wheat, consigned to us by W. G. Fitch, cash., with instructions to hold the same until the following drafts are paid:

"W. P. McLaren & Co. on	A. F. Smith & Co.,	st.,	$3,422 92	and exg.
"Do.	do.	do.	Oct. 30, 6,600 00	and exg.
"Do.	do.	do.	Nov. 14, 6,600 00	and exg.

"Please hold for account accordingly.

"Yours, truly,

"J. F. MOFFITT, *Cashier.*"

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COUNSEL FOR THE DEFENDANT. That was an inadvertant concession.

The COURT. An inadvertant concession of that kind is not to be held conclusive, and at any time during the progress of the trial the defendant is at liberty to change his ground in that respect, if, upon reflection and examination of the testimony, he supposed that the fact was in doubt, and that there was fair ground for debate. I only repeat the general proposition that I have already given to you, when I say substantially, at least, in the terms of the request, that the jury cannot find a verdict against the defendants in respect to the 4,358 bushels of wheat claimed as a part of the cargo of the canal-boat Anna Rebecca, for any larger part of that quantity than the jury are satisfied from the evidence is of the same wheat that was brought to the elevator by the schooner Corsican. That is simply a reiteration in its application
168 to that particular shipment by the Anna Rebecca, which I have said, in general terms, is applicable to the whole of the wheat claimed to be part of the cargoes shipped from Milwaukee.

I shall not recite the evidence that bears upon the subject. I will say in regard to a case of this sort, that the existence of the occasion for such a controversy is painful. As I have heretofore said, and have

assumed, and I desire to say that I shall assume, these defendants have acted with entire good faith in respect to the shipments made to them, and in the advances which they have made upon these cargoes. And I need not add that it is hard, hard in the ordinary language of mankind, that, acting with honesty, with integrity, and with fairness, and, as they supposed, safety, they have been placed in peril of loss.

On the other hand, it is not questioned that the plaintiffs acted in like good faith, and it is not even denied that they acted according to the ordinary course of business, in advancing their money and in obtaining what they conceived to be perfect security, at least to the extent of the value of the property. I say that a controversy like this is painful, because the loss that results must fall upon one or another, with whose conduct in the transaction no fault can be found; and yet, gentlemen, the affairs of human life, and the relative rights and duties of parties in those affairs are to be determined by law, they must be determined by rule, or there is no safety in anything, and according to the application of the rules of law governing a transaction of this sort, the loss must fall on the one or the other. All business is done in subordination to those rules, and, at whatever hazard, is necessarily involved in the nature of the business. The hazard here, on the one hand, has been a hazard that, with all the precautions the plaintiffs took to follow the wheat with bills of lading and instructions, specific and definite, they might be betrayed in their confidence. And, on the other hand, that with all the precautions which the defendants deemed it fitting to take, and acting with entire fairness they deemed it necessary to take, they, if the loss is to fall upon them, have been betrayed. The transaction has operated as a fraud by A. F. Smith upon them; so that the case comes very largely, if not precisely, to the views that were read to you by counsel from some of the books here, that parties necessarily in most of the transactions of human life have to depend upon their confidence in the parties with whom they deal.

I say, gentlemen, that I do not propose to review the evidence. If you find that the cargo of the Four Sisters came out of the cargo of the Kate Kelly, then the plaintiffs' rights in that re'pect stand just where they do in relation to the cargo of the Hagaman, about the identity of which counsel for the defendant make no claim of doubt. And so also as to the cargo of the Anna Rebecca, of 4,358 and 2,700 bushels. The counsel on both sides have called your attention to documents and testimony. On the one hand it is claimed that they have created such a doubt that, under a just rule, that where defendants are to suffer injustice, the jury are to be satisfied that the plaintiff has proved the case which he seeks to establish. I say the defendants have claimed that they have thrown, at least, such doubt about it as that you ought to find a verdict in their favor. On the other hand, the plaintiff's counsel have claimed, by reference to documents which he shows were contemporaneous, and coupling them as he does with some reference to testimony, that he has made it so plain that the cargo of the Anna Rebecca came out of the Corsican, as well as the cargo of the Four Sisters from the Kate Kelly, that you ought not for a moment to hesitate.

169 Now as to the measure of recovery, I have adopted a rule most favorable to the defendants. It may be that the facts are such that the favor is not large; perhaps not. But I have, as a rule, held, and I instruct you that the plaintiffs, to the extent only of their interest in each cargo, can claim indemnity, so that if in a cargo sold by the defendants the interest of the plaintiff in that particular cargo is less

than the value of the wheat, the defendants have the benefit of the excess; but where the unpaid drafts are equal or exceed the value of such portion of the cargo to which the drafts unpaid relate, in the defendants' hands, the rule which I have given, although a favorable one in its character, is of no particular avail to the defendants because the plaintiff's interest exceeds or is equal to that value.

Now, gentlemen, that last view of the subject is what I understand the defendant to mean in his request for instructions, and in which he is quite right, that the plaintiffs are not entitled in any case to recover an amount exceeding their unpaid beneficial interest in the several cargoes. I think, gentlemen, that covers the only question of fact that is in dispute, and if counsel desire hereafter that the questions of law that have arisen shall be considered further, they will receive the attention of the court, and much greater deliberation than it is possible for the judge to give them on a nisi prius trial.

I have been asked to state to you that the allowance of interest upon the value of the wheat is a matter in your discretion; I do not so understand the rule governing that subject. The object of the recovery is to give the plaintiff indemnity, and if he recovers the value of the wheat, he is entitled to interest upon it from the time when the wheat should have been surrendered or its value paid over, which was when the wheat was demanded.

The defendants except to the charge that the allowance of interest was otherwise than in the discretion of the jury.

The defendants also except to the charge as amounting to a direction to the jury to find a verdict for the plaintiff.

The defendants in due time excepted separately to the judge's not charging each of the above requests to charge, except such as are charged in his charge.

The jury, under such charge, on 19th day of April, 1872, brought in their verdict for the plaintiff for $31,111.51.

And because none of said exceptions so offered and made to the opinions and decisions of the said circuit judge do appear upon the record of said trial, therefor', on the prayer of the said defendants, by their counsel, the said circuit judge hath to this bill of exceptions set his seal, pursuant to the statute and the rules and practice of this court, on the 12th day of September, 1872, in said April term of said circuit court.

L. B. WOODRUFF. [SEAL.]

170 (Endorsed:) U. S. circuit court S. D. of New York. The National Exchange Bank of Milwaukee ag't David Dows, John Dows Mairs, and Alexander Ector Orr. Bill of exceptions. C. Van Santvoord, att'y for def'ts. Filed Nov. 14, 1872.

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173 Supreme Court of the United States.

DAVID DOWS, JOHN DOWS MAIRS, AND ALEXander Ector Orr, plaintiff' in error,
vs.
THE NATIONAL EXCHANGE BANK OF MILwaukee, def't in error.

Of December term, in the year of our Lord one thousand eight hundred and seventy-two, to wit, of the third Monday of said December term.

Afterwards, to wit, on the third Monday of December, in the same term, before the justice' of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said David Dows, John Dows Mairs, and Alexander Ector Orr, by C. Van Santvoord, their attorney, and say that in the records and proceedings aforesaid, and
174 also in giving the judgment aforesaid, there is manifest error in this, to wit, that the declaration aforesaid, and the matters therein contained, are not sufficient in law for the said The National Exchange Bank of Milwaukee to have or maintain its aforesaid action thereof against the said David Dows, John Dows Mairs, and Alexander Ector Orr; there is also error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given for said The National Exchange Bank of Milwaukee against the said David Dows, John Dows Mairs, and Alexander Ector Orr, whereas by the law of the land the said judgment ought to have been given for the said David Dows, John Dows Mairs, and Alexander Ector Orr against the said The National Exchange Bank of Milwaukee.

And the said David Dows, John Dows Mairs, and Alexander Ector Orr, pray that the judgment aforesaid for the errors aforesaid and
175 other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that they may be restored to all things which they have lost by reason of said judgment, &c.

C. VAN SANTVOORD,
Att'y for Pl'ff in Error.

(Endorsed:) U. S. Supreme Court. David Dows, John Dows Mairs, & Alexander Ector Orr, plaintiff' in error, vs. The National Exchange Bank of Milwaukee, defendant in error. Assignment of errors. C. Van Santvoord, att'y for pl'ff in error. Filed Nov. 30, 1872.

176

177 *Bond for damages, costs.*

Circuit court of the United States of America for the southern district of New York, in the second circuit.

THE NATIONAL EXCHANGE BANK OF MILWAUKEE,
vs.
DAVID DOWS, JOHN DOWS MAIRS, AND ALEXANDER ECTOR ORR.

Know all men by these presents that we, David Dows, John Dows Mairs, Alexander Ector Orr, Josiah M. Fiske, and William H. Mairs are held and firmly bound unto the above-named The National Exchange Bank of Milwaukee, in the sum of sixty-six thousand ($66,000) dollars, to be paid to the said The Nat'n'l Exchange Bank of Milwaukee, for the payment of which well and truly to be made we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these present, sealed with our seals, and dated the twenty-ninth day of November, in the year of our Lord one thousand eight hundred and seventy-two.

Whereas the above-named David Dows, John Dows Mairs, & Alexander Ector Orr have prosecuted a writ of error to the Supreme Court of the

United States, to reverse the judgment rendered in the above-entitled suit, by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named David Dows, John Dows Mairs, & Alexander Ector Orr shall prosecute their said writ of error to effect and answer all damages and costs, if they fail to make their plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

DAVID DOWS. [L. S.]
JOHN D. MAIRS. [L. S.]
A. E. ORR. [L. S.]
JOSIAH M. FISKE. [L. S.]
W'M H. MAIRS. [L. S.]

Sealed and delivered, and taken and acknowledged, this 29 day of Nov., 1872, before me.

EDWARD L. OWEN,
U. S. Commissioner, S. D. of N. Y.

178 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Josiah M. Fiske, residing at No. 231 Fifth avenue, in the city of New York, and William H. Mairs, residing at No. 165 Carrol st., in the city of Brooklyn, being duly sworn, depose and say each for himself, that he is a freeholder in the State of New York, and that he is worth the sum of sixty-six thousand dollars, over and above all his just debts and liabilities.

JOSIAH M. FISKE.
W'M H. MAIRS.

Sworn to this 29th day of Nov'r, A. D. 1872, before me.

EDWARD L. OWEN,
U. S. Commissioner for the South. Dist. of New York.

The within bond approved as to form and sufficiency of the sureties. Dated Nov. 29, 1872.

L. B. WOODRUFF,
Circuit Judge.

(Indorsed:) Vol. , page , U. S. circuit court. The National Exchange Bank of Milwaukee vs. David Dows, John Dows Mairs, & Alexander Ector Orr. Bond for damages & costs on appeal to Supreme Court of the United States. C. Van Santvoord, att'y for def't. Filed this 29 day of Nov'r, 1872.

179 U. S. circuit court for the southern district of New York.

THE NATIONAL EXCHANGE BANK OF MILWAUKEE, *vs.* DAVID DOWS, JOHN DOWS MAIRS, AND ALEXANDER ECTOR ORR. } Citation.

By the honorable Lewis B. Woodruff, judge of the circuit court of the United States for the southern district of New York, in the second circuit.

To the above-named The National Exchange Bank of Milwaukee:

Whereas the above-named David Dows, John Dows Mairs, and Alexander Ector Orr, have lately brought a writ of error to the Supreme Court of the United States from a judgment lately rendered in the circuit court of the United States for the southern district of New York, in the second circuit, in favor of said The National Exchange Bank of Milwaukee, against the said David Dows, John Dows Mairs, and Alexander Ector Orr, for the sum of thirty-two thousand six hundred and eighty $\frac{51}{100}$ dollars damages and costs, and have filed said writ of
180 error with the clerk of said circuit court, and have also given and filed the security required by law for the prosecution of their said writ of error to effect and to answer all damages and costs, if they fail to make their plea good:

You are therefore hereby cited to appear before the said Supreme Court of the United States at the city of Washington, on the third Monday of December next, the return-day of said writ of error, in the December term of said court, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of New York, in the southern district of New York, in the second circuit, the 29th day of November, in the year one thousand eight hundred and seventy-two, and of the Independence of the United States the ninety-seventh.

L. B. WOODRUFF,
Circuit Judge.

Due service of a copy of above citation is hereby admitted.
New York, Nov. 29th, 1872.

PORTER, LOWREY, & SOREN,
Pl'ff's' Att'ys.

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182 (Indorsed:) United States Supreme Court. David Dows, John Dows Mairs, and Alexander Ector Orr, plaintiffs in error, v. The National Exchange Bank of Milwaukee, defendants in error. Citation. C. Van Santvoord, att'y for pl'ffs in error. Filed Nov. 30, 1872.

(Indorsement on cover:) No. 364. David Dows, John Dows Mairs, and Alexander Ector Orr, plaintiffs in error, vs. The National Exchange Bank of Milwaukee. S. New York, C. C. U. S. Filed 11 December, 1872.

U. S. Supreme Court.

DAVID DOWS, JOHN D. MAIRS, and ALEXANDER E. ORR,
Pl'ffs in Error,
vs.
THE NATIONAL EXCHANGE BANK OF MILWAUKEE,
Defendant in Error.

Brief and Points of Pl'ffs in Error.

I.—This case comes before this Court on Writ of Error to the Circuit Court of the U. S. for the Southern District of New York.

The action was in *trover* commenced the 6th Nov., 1869, by the issuing of a *capias* returnable the 20th of that month.

In the declaration it is alleged that the plaintiff, the National Exchange Bank of Milwaukee, theretofore, to wit, on the 1st day of October, 1869, at the City of New York, was the owner and lawfully possessed as of its own property, of certain wheat, to wit, of the following parcels, namely:

(1) Of 3,047 bushels, which were laden on the caanal boat, "Four Sisters."

(2) Of 7,100 bushels, which were laden on the canal boat "Hagaman."

(3) Of 4,358 bushels, which were laden on the canal boat, "Anna Rebecca."

(4) Of 7,836 bushels, which were laden on the canal boat, "George Ames."

Being altogether 22,341 bushels of wheat, of the value, to wit, of $50,000, which the plaintiff casually lost out of its possession, and which came into the possession of the defendants by finding, who converted the same, to the damage of the plaintiff of $60,000.

Plea—The general issue.

The cause was tried before the Circuit Judge and a jury, who, under the charge of the Judge, on the 19th day of April, 1872, brought in their verdict for the plaintiff for $31,111\frac{51}{100}$.

And thereafter a bill of exceptions was signed and sealed in the same term of the Circuit Court.

The defendants were produce commission merchants, doing business in New York under the firm name of David Dows & Co.

A. F. Smith & Co. were dealers in grain and commission merchants at Oswego. This firm was composed of A. F. Smith and Sidney Bickford. A. F. Smith was the leading member of the firm.

The particular branch of the business of which Bickford had charge was the correspondence (p. 76, fo. 79.)

Sidney Bickford was called as a witness for plaintiffs.

It is a peculiar feature of Oswego, as a lake port in which the grain business was and is the largest done there, that the dealers in grain and commission merchants have a warehouse with an elevator on the river, having some distinctive name, where they transact their business. Smith & Co. had such a warehouse with an elevator, which was called the Corn Exchange Elevator.

David Mannering on pp. 161, 162, in fos. 160, 161.

The business which A. F. Smith & Co. carried on there was that of dealers in grain on their own account, and

Commission Merchants, and they advertised themselves as dealers in grain, and commission merchants and proprietors of the Corn Exchange Elevator. They sometimes took in grain on storage for other parties, when that was stipulated for; but the general business transacted at the warehouse was that of dealers in grain, and commission merchants.

Bickford on pp. 68, 69, in fo. 71.

Same on p. 84, in fo. 86.

J. F. Moffit in p. 45, toward foot.

Morgan M. Wheeler, on p. 53, in fo. 57.

The nature of the transactions which defendants had with them was receiving consignments of grain for sale on commission. They never had any transactions with them as warehousemen.

Bickford on p. 69.

In the course of these defendants' dealings with A. F. S. & Co., as receivers of grain for their account for sale for a commission, the defendants, on the 20th Sept., 1869, received through the Fourth National Bank of New York a Bill of Lading dated Sept. 18th, 1869, for 7,400 bushels No. 2 Milwaukee wheat, which had been shipped at Oswego on the boat "Four Sisters" on the day of its date, showing the shipment by A. F. Smith & Co., for their account, to the care of David Dows & Co., New York, with sight drafts attached, same date, for $9,546, to the order of B. Seaman, Cashier, (who was the cashier of the said Fourth National Bank). The defendants paid the draft on presentment on delivery of the bill of lading and accompanying Certificate of Insurance.

The boat arrived in New York on the 9th Oct., 1869, and the wheat was sold Oct. 11, 1869. (See on p. 147).

1869, Sept. 29, the defendants received through the Fourth National Bank a bill of lading dated Sept. 27, 1869, for 7,100 bushels No. 1 Milwaukee Wheat, which had been shipped at Oswego on the boat "Hagaman" on the day of its date, showing the shipment by A. F. Smith & Co. for

account of A. F. Smith & Co. to the care of David Dows & Co., New York, with sight draft attached for $8,763 to the order of B. Seaman, Cashier, (the cashier of that bank). The defendants paid the draft on presentment on delivery of the bills lading and accompanying certificate of insurance.

1869, Oct. 11, the defendants received through the Ninth National Bank (of which John C. Hill was cashier) a bill of lading, dated Oswego, Oct. 8, 1869, for 7,200 bushels No. 1 Milwaukee Wheat, which had had been shipped at Oswego on the boat "Anna Rebecca" on the day of its date, showing the shipment by A. F. Smith & Co. for account A. F. Smith & Co. to David Dows & Co., New York, with sight draft attached, $7,700 to the order of John T. Hill, Cashier. The defendants paid the draft on presentment on delivery of the bill lading and accompanying certificate of insurance.

1869, Oct. 11, the defendants received through the Fourth National Bank, a bill lading dated Oswego, Oct. 8, 1869, for 7,836 bushels No. 1 Milwaukee Wheat, which had been shipped at Oswego on the boat "George Ames," on the day of its date, showing the shipment by A. F. Smith & Co. for their account to the care of David Dows & Co., New York, with sight drafts attached, same date, for $6,284.52, to the order of B. Seaman, Cashier. The defendants paid the draft on presentment on delivery of the bill lading and accompanying certificate of insurance

The testimony to the particulars of the shipments from Oswego to New York, which was offered in evidence by the defendants for the purpose of showing title in defendants as consignees by reason of advances made on consignments by bill of lading of the wheat shipped by A. F. Smith & Co. to the defendants, in connection with evidence that such advances were made in the usual course of business and bona fide, and without notice of any claim of the plaintiff or of any other person thereto except A. F. Smith & Co.,

which was excluded by the Court as inadmissable for such purpose under exception, is set forth in the Bill of Exceptions, on p. 148, commencing with Bennett, a witness, &c., 149 to end of 3d paragraph on p. 158.

1869, October 14, the defendants received an order from A. F. Smith & Co. of this date on them in favor of Norris Winslow, banker, Watertown, for balance from wheat consigned to David Dows & Co. by A. F. Smith & Co., and a letter from the Merchants' Bank, Watertown, dated October 15th, 1869, (Ex. N. W. No. 1 A. B. G.) found on p. 146, proved by Winslow on p. 144 to be in his handwriting, in which addressing defendants he says, "Gents,—Messrs. A. F. Smith & Co., of Oswego, New York, have given me an order on you for any margin due them in grain or money advanced by them to you * * * I sent the order to our correspondents Messrs. Denny & Co., who has I presume ere this called on you. Yours very truly, N. WINSLOW."

This order and letter of Winslow, (who was the Merchants' Bank at Watertown) confirming it, referred to in the answer of David Dows & Co. to the demand of the plaintiffs on them of November 6th, 1869, was offered in evidence as a justification of the answer to such demand, and of the refusal therein, after the plaintiffs had put in evidence a transfer by them to Winslow, or the Merchants' Bank, of which he was the proprietor, of the wheat of which plaintiff claimed the above boat load, was a part.

The plaintiff's counsel objected to the receipt of the order and letter as irrelevant, incompetent and immaterial to the issue in the cause.

The objection was sustained and defendants excepted.

See fos. 145, 146, 160.

1869, October 22d. The defendants received a telegram from Oswego of this date, of which the following is a copy:

"DAVID DOWS & Co., New York City.

"Three thousand and forty-seven (3,047) bushels wheat, shipped you from Oswego, September eighteenth (18)

eighteen hundred and sixty-nine (1869) on canal boat "Four Sisters" from schooner "Kate Kelly"; and seventy-one hundred (7,100) bushels wheat shipped you from Oswego, September 27th, 1869, on canal boat "B. Hagaman"; and seventy-eight hundred and thirty-six (7,836) bushels wheat shipped you from Oswego, October eighth (8th) eighteen hundred and sixty-nine (1869) on canal boat "Geo. Ames": and forty-three hundred and fifty-eight (4,358) bushels wheat shipped you from Oswego same day, on canal boat "Anna Rebecca" from schooner "Corsican" is the property of the National Exchange Bank of Milwaukee, which will hold you responsible for the same."

W. G. FITCH,
Cashier of the National Exchange Bank of Milwaukee.

One George I. Jones and McLaren, who had sent the above dispatch to defendants, on the next morning presented themselves to David Dows, in New York City, when Mr. Dows admitted the receipt of the dispatch, and said he would notify them of the arrival of the wheat, and on its arrival point it out to them, provided they did not attempt to stop the wheat by replevin on the canal; and that if he caused the wheat to be put in store he would keep each boat load separate, and identify it as the wheat coming out of those canal boats, and would only require them to prove the identity of their wheat into said canal boats. He said that in this he did not admit their right to the wheat.

On the 5th Nov., D. D. & Co. forwarded plaintiffs' attorney a memorandum of the arrivals of the wheat shipped to them by and for account of A. F. Smith & Co., and advanced upon by D. D & Co., read in evidence by plaintiff's counsel on p. 147.

1869, Nov. 6, a formal demand by note of that date, was made on defendants for the wheat claimed on behalf of the National Exchange Bank, from the four boat loads, by H. M. Finch, as its attorney, to which the defendants replied: "If you are entitled to the wheat and will pay the freight and charges and our advances, and take care of the order to Winslow, we will account to you for the proceeds, but we don't know you in the matter."

See pp. 146, 147, 148.

On the trial the plaintiffs put in evidence entries from the Grain Book of A. F. Smith & Co., kept at their warehouse (Ex. 42, on p. 87, and Ex. 44, on p. 88,) verified by the oath of Bickford, and explained by him on pp. 64-65, the first Ex., No. 42, showing the receipts into the Corn Exchange Elevator: 1869, Sept. 16, from schooner "Kate Kelley," for account A. F. Smith & Co., 16,226 bushels 44 pounds wheat, and 1869, Sept. 24, from schooner "Grenada," for same account, 14,502 bushels 69 pounds; the second Ex., 44, showing receipt into the Corn Exchange Elevator: 1869, Oct. 8, from the schooner "Corsican," for account A. F. Smith & Co., 13,358 bushels 05 pounds wheat.

He then put in evidence the entry accounting for these receipts by deliveries, Ex. 43 and 45, thereby showing a delivery for account of A. F. Smith & Co., Sept. 18th, 1869, of 3,047 bushels, on boat "Four Sisters," at Oswego, from the schooner "Kate Kelly;" and a delivery, for account of A. F. Smith & Co., Sept. 27, 1869, of 7,100 bushels, on boat "Hagaman," from schooner "Grenada;" and a delivery at Oswego, for account of A. F. Smith & Co., 1869, Oct. 8, on the boat "Anna Rebecca," of $4,358\frac{27}{60}$ bushels, from the schooner "Corsican;" and a delivery same date, 1869, Oct. 8, on the boat "George Ames," of 7,836 bushels, from the schooner "Corsican."

And by reference to other entries of talleys, and in his books, admitted by the Judge in evidence, and proofs as to the system of receipts and deliveries at the warehouse, the plaintiff's Counsel was enabled to establish, to the satisfaction of the jury, the identity of 3,047 bushels of the wheat shipped to the defendants on the boat "Four Sisters," Sept. 18, 1869, as having formed a part of the wheat received from schooner "Kate Kelly," for account of A. F. S. & Co., 1869, Sept. 16, and the identity of the 7,100 bushels laden on the boat "Hagaman," as part of the wheat received from the schooner "Grenada," as above; and the identity of 4,358 bushels of the load shipped on the "Anna Re-

becca," and of the boat load shipped on the "George Ames," as having come from the schooner "Corsican."

Assuming this identity, the plaintiff's counsel claimed title to the wheat by each of these schooners which had been purchased and shipped at Milwaukee, under order and for account of, A. F. Smith & Co., by Wm. P. McLaren & Co., of Milwaukee, upon a construction of the bills of lading and documentary and other evidence as importing a condition precedent to any transfer out of the plaintiff of the title acquired by its discounting the drafts, sight and time, drawn on A. F. Smith & Co., on delivery to the plaintiff of the bill lading with the drafts attached, that all the drafts should be paid; and that, too, notwithstanding any delivery of the wheat to A. F. Smith & Co. by the Merchants Bank, to whose care the wheat was consigned by the bills lading.

The bills of lading and documentary and other evidence is found in the deposition of W. G. Fitch, cashier of the plaintiff's bank, pp. 6 to 21; William P. McLaren, pp. 21 to 38; John F. Moffit, Cashier of the Merchants' Bank at Watertown, pp. 39 to 52; Morgan M. Wheeler, owner of the Schooner "Grenada," pp. 52 to 54; Archibald D. McIntyre, Master of the "Grenada," pp. 56, 57; William A. McCarthy, Master of the "Corsican," pp. 57–60; Sidney Bickford, pp. 61 to 107; Norris Winslow, proprietor of the Merchants's Bank of Watertown, pp. 141–146.

The depositions of McCanna, pp. 107–119, who was foreman of the elevator; of Bough, a weighman at the elevator, pp. 120 to 126; of George Minor, machinery man, pp. 126 to 134; of Robert Burgess, pp. 134–140, machinery man, are upon the question of identity.

Wm. P. McLaren & Co. were commission merchants at Milwaukee, who had kept an account at the plaintiff's bank for about six years (foot of p. 20), and who did their business as purchasing agents for shipment, through that bank. When they brought the drafts for discount to the bank, they

told the Cashier they had an order to buy for Smith a cargo of wheat at some times; at other times they simply asked the cashier if he could do such and such time paper on Oswego (Fitch, p. 19, fo. 25).

In one of the letters forming part of the correspondence in relation to these cargoes, W. P. McL. & Co., to A. F S. & Co., date 25th Sept., 1869, W. P. McL. & Co. urge as a reason why A. F. S. & Co. should send their orders exclusively to them, "that their facilities for doing time paper are fully equal to any house here, and we are very glad to afford you any benefit of it that we can" (annexed to dep. Bickford, on p. 104, in fo. 1061).

A. F. Smith & Co. had kept their account with the Merchants' Bank at Watertown, and their accounts had been among the largest kept at that bank, and down to their suspension, 1869, Oct. 15, their credit was good at that bank.

Moffitt on p. 46.

Norris Winslow (on p. 144) swears as to the credit and standing of A. F. Smith & Co., prior to and down to their failure on the 15th Oct., 1869, that they enjoyed an enviable reputation and very high credit.

The wheat shipped on the schooners was purchased for account of A. F. Smith & Co. by W. P. McLaren & Co., under orders, showing that it was ordered for immediate use.

The letter and telegram date Oswego, Aug. 28, 1860, on p. 23, are referred to by McLaren in his deposition as the orders under which the wheat shipped by "Kate Kelly" was purchased and shipped.

The same are set forth by Bickford on pp. 92, 93.

In this letter A. F. S. & Co. say, "We are almost entirely out of wheat—need some just as soon as we can get it—but don't want to pay much more freight by propellor than by sail."

After some further correspondence in letter to W. P.

McLaren & Co., dated Oswego, 9th Sept., 1869, A. F. Smith & Co. say, "Fill up load No. 1 and let it come without hanging. If the schooner "Granada" is there, would sooner load her than a strange vessel." In pursuance of this order, as McLaren swears, McLaren & Co. bought and shipped cargo No. 1 wheat per schooner "Granada." McLaren on p. 28.

The letter containing the order is given by Bickford on p. 99.

In letter of A. F. Smith & Co. to W. P. McLaren, dated Oswego, 22d Sep., 1869, they say, "We feel considerably like taking another cargo No. 1 for our local trade, and if freights are no higher than 12 cts., and you can draw as before, you may buy and ship another cargo; draw through Merchants' Bank."

McLaren on p 28; Bickford on p. 103.

The proofs show that the way in which it was contemplated that A. F. Smith & Co. should have the use of the wheat purchased under these orders, before the maturity of the drafts at 30 days and 45 days, was by shipping it under consignment to the Merchants' Bank, as Smith's bankers, upon the responsibility of that bank as a party with which A. F. Smith & Co could make arrangements for his accommodation; and that it was shipped under consignment to or subject to the order of that bank, upon its agreement to be responsible for the wheat if the drafts should not be paid.

William P. McLaren, a witness called for the plaintiff, swears, (on page 37,) that the wheat in question came to be consigned to the care of the Merchants' Bank, of Watertown, N. Y., because Smith & Co. requested that it should be so consigned, and that the reason given by A. F. Smith & Co. for that request, was that they could procure accommodation from that bank at times when they could not from Oswego banks, and having been acquainted with that bank and done business with it for many years, while Mr. Smith was at Cape Vincent, they desired to do a portion of their business with

it, and that the consignments were made to that bank after his firm had made inquiry as to the standing and position of the bank, and had found that the reputation of the bank for ability and integrity was very good, and that it had the reputation of being a strong bank financially.

There is further evidence that the wheat by these vessels went forward under consignment to the Merchants' Bank under its absolute agreement to be responible for the wheat to the plaintiff, if the drafts should not be paid, without any agreement on its part to hold the wheat until the drafts should be paid.

The shipment by the "Kate Kelly," on the 1st Sept., 1869, under bill of lading of that date, was the first of the shipments in question.

After that bill had been delivered to him with the drafts attached, which he discounted, and before transmitting it, with the drafts drawn against it on A. F. Smith & Co., to the Merchants' Bank for collection, with the other enclosures, the Cashier Fitch had written an endorsement upon it, "On payment of three drafts, drawn by W. P. McLaren & Co., on A. F. Smith & Co., Oswego, N. Y., to my order, and dated Sep. 2, 1869; one draft at sight, for $4,080.81; one draft at 30 days date, for $7,500; and one draft at 45 days, for $7,500, all being payable at the Merchants' Bank, Watertown, N. Y., you will surrender the within wheat to A. F. Smith & Co., or order. Should the drafts above specified not be paid promptly, hold the wheat for my account, W. G. Fitch, Cashier."

The B. L. and endorsement on pp. 12 and 13.

In his letter of Sept. 2, to the Cashier Merchant's Bank, (on p. 13) after stating: "I hand you for collection and remittance to Mercantile National Bank, New York, for my credit the drafts," describing them, B. L. Schr. "Kate Kelly," 8,727 bushels Amber Mil. Wheat.

"5,527^{20} bushels No. 1 Amber Mil. Wheat consigned to your bank for my account, and to be held by you subject to the payment of the above drafts," he adds:

"I consign this wheat to you to be held as per endorsed bill of lading, and surrender only on payment of the drafts drawn against it, holding you responsible for the same in case of non-payment of the drafts. Will you receive consignments in this way, charging reasonably for the same?"

The reply to this is found on p. 14, as follows:

MERCHANTS' BANK,
WATERTOWN, N. Y., *Sept.* 6, 1869.

W. G. FITCH, Esq.

Dear Sir,—I have received your letter of the 2d inst., with enclosures as stated, and it has attention.

Respectfully yours,
J. F. MOFFITT, *Cashier.*

Fitch to Merchants' Bank, date *Sep.* 8, 1869.

Sep. 8, 1869.

To MERCHANTS' BANK, *of Watertown, N. Y.:*

In my letter of the 2d inst. I requested you to state in your letter whether you would hold all wheat I consign to you strictly for my account, holding your bank responsible for the safe keeping of the property for this bank, and holding such property subject to my order in all cases where the drafts made against it are not paid. Your reply of the 6th inst. does not answer my inquiry. Will you please write me by return mail, defining your position? We have adopted the invariable rule to in no instance consign property, only on condition that the consignee acknowledges himself responsible for it until instructed to hand over to a third party.

Very respectfully,
W. G. FITCH, C.

1869, Sep. 13, the Merchants' Bank writes to Fitch as follows:

MERCHANTS' BANK,
WATERTOWN, N. Y., *Sep.* 13, 1869.

W. G. FITCH, Esq., *Cas.*

Dear Sir—Yours of the 8th received. I believe your inquiry was answered in mine of the 11th inst.

Yours respectfully,
J. F. MOFFITT, *Cas.*

Between the date of the letter of Fitch, of Sep. 8, 1869, and that of the Merchants' Bank, of Sep. 13, 1869, the Bank at Milwaukee received the letter of Merchants' Bank as

follows, defining its position as requested in Fitch's letter of the 8th Sep. above:

MERCHANTS' BANK,
WATERTOWN, N. Y., *Sep.* 11, 1869.

W. G. FITCH, Esq.

Dear Sir,—In reply to yours of 2d inst., I would say that we will receive (until further notice) such consignments as you choose to send us, holding us responsible for the grain in case of non-payment of drafts, and shall charge you $\frac{3}{8}$ p. c. commission for so doing.

Very respectfully,
J. F. MOFFITT, *Cas.*

This letter the 11th Sep., received by plaintiffs' bank, between the 8th Sep. and 13th Sep., was received before the arrival of any of these vessels at Oswego.

(These letters of Fitch, Sep. 8, Moffitt Sep. 13 and 11th on pp. 17, 18.)

The Judge overruled the objection of defendants to plaintiffs' reading the answers of this witness as to arrangements, in their very terms relevant only to transactions where one Farwell, acting as agent of A. F. Smith & Co., desired to designate the banks East through whom drafts drawn against grain should be sent, and the defendants excepted. This will be referred to more fully hereafter.

It is submitted, that the exceptions to reading the answers objected to, foot of p. 36 and on top p. 37 as not binding on Smith & Co. as to transactions in question in this case and as not relevant were well taken, but the import of this arrangement was misconceived by the Judge.

The transactions in question were purchases by W. P. McL. & Co. for account of A. F. Smith & Co. under orders direct from them for immediate use, shipped under consignment to the Merchants' Bank, as a consignee, designated by the purchaser as a party with whom the purchaser might make the necessary arrangements to effectuate the objects of the purchase.

Precisely what McLaren & Co. did, appears from the evidence. They bought and shipped the wheat for account

and by order of A. F. Smith & Co., in each case presumptively in good faith and with the intent that A. F. S. & Co. should have the use of the several consignments through the Merchant's Bank as a consignee designated by them, and paid for them by checks upon the plaintiff.

Upon each shipment, on the day of the date of the bill lading in each case on board, the "Kate Kelly" on the 1st September, 1869, on the "Grenada" on the 11th September, 1869, on the "Corsican" on the 25th September, 1869, they took a bill of lading from the master of the vessel, showing a shipment by them as agents for account W. G. Fitch, Cashier, as the party to whom it had been arranged or was proposed to deliver it, with the drafts attached for discount, to provide for payment or reimbursement of the checks.

They so took it with the consignment thereon to the Merchants' Bank, as the consignee designated by A. F. Smith & Co., in order to give the Merchants' Bank the control of the consignment for the use of A. F. Smith & Co., upon its responsibility to the holder of the drafts, and thereafter attached the drafts.

In the case of the "Kate Kelly's" drafts, dated September 21, 1869, payable to the order of W. G. Fitch, Cashier, at the Merchants' Bank, Watertown, with N. Y. Ex.

W. P. McLaren & Co., on A. F. Smith & Co., Oswego.

Sight	$4,080 81
Time, do, due Oct. 5	7,500 00
" " due Oct. 20	7,500 00

In the case of the "Grenada," 3 drafts, dated 13th Sep., 1869, payable to the order of W. G. Fitch, Cashier, at the Merchants' Bank, Watertown, with N. Y. Exchange.

W. P. McLaren & Co., on A. F. Smith & Co., Oswego, due Oct. 16 ..... $8,000 00

W. P. McLaren & Co., on A. F. Smith & Co., Oswego, due Oct. 31 ..... $8,000 00

W. P. McLaren & Co., on A. F. Smith & Co., Oswego, Sight $1,232 24

In the case of the "Corsican," 3 drafts, dated, 20 Sep., 1869, payable to the order of W. G. Fitch, Cashier, at the Merchants' Bank, Watertown, with N. Y. Exchange.

McL. & Co. then took the bill lading, with the drafts attached, to the Cashier, Fitch, and said they had an order to buy for Smith a cargo of wheat, or they asked him if he could do such and such time paper on Oswego. (Fitch, toward foot of p. 19.)

Fitch accepted the bill with the consignments as noted thereon and discounted the drafts and passed the proceeds to the credit of W. P. McL. & Co. McL. & Co. then transmitted an invoice to A. F. Smith & Co., showing the purchase of the wheat, bought for account and by order of A. F. Smith & Co,, Oswego, N. Y., through W. P. McLaren & Co. In this invoice, charging A. F. S. & Co. with the cost of the wheat and charges for the inspection, storage, insurance, interest, marine insurance, stamps on time draft and commission, and closing the transaction by a credit of the net proceeds of the drafts drawn against the wheat, which are mentioned.

See the invoice of cargo "Kate Kelly," on p. 24, Ex. No. 4.

Invoice of "Grenada" cargo on pp. 25–26.

Invoice of cargo "Corsican," on pp. 26–27.

The transmission of these invoices, which were bills of parcels or of sale, upon receipt of them, was an appropriation of the wheat on board the vessel to the use of A. F. S. & Co., as the purchasers, which passed the title to A. F. S. & Co., as the owners.

This title, as the owners, was subject, however, to such control of the possession or possessory right as McLaren & Co., or the plaintiff as the substituted consignor, as the holder of the drafts, had as security for the acceptance or payment of the drafts by reason of the possession of the bill of lading until such possession should be transferred to the consignee.

These Lake Bills (on pp. 12, 8 and 15 and 16), are not

bills in *form*, showing a shipment to the order of W. P. McL. & Co., or to the order of W. G. Fitch, Cashier, but bills showing a shipment to the order of the Merchants' Bank at Watertown, as the consignees to whom the delivery of the wheat was to be made; which upon transmission and delivery to the latter bank, in furtherance of the object of the consignment or for value, would transfer the title and right of possession to the latter bank; and these several bills being transmitted and delivered to the Merchants' Bank as the consignee designated by A. F. Smith & Co., and upon their agreement to be responsible for the wheat if the drafts were not paid, were transmitted and delivered to such consignee for value.

In the letters of Fitch enclosing the bill lading to the Merchants' Bank, in each case was a certificate of insurance charged in the invoice which terminated on the vessel's arrival at Oswego. They are expressed "on cargo of the schooner (naming it) at and from Milwaukee to Oswego." Moffit, p. 47; and there was no provision by plaintiff for further insurance, nor for payment of the freight or other charges, and the bills were endorsed by Fitch "without recourse," all of which are indications that the title was to change before or on arrival at Oswego.

The endorsement on these bills by Fitch on payment of the drafts to *surrender* the wheat to A. F. Smith & Co., or order, with the further direction "should the drafts not be paid promptly, hold the wheat for my account;" and the instruction in the letter to surrender only on payment of the drafts, were endorsed and written by Fitch in the bank after he had received the bills and discounted the drafts.

Fitch, p. 8, in fo. 15.

Fitch, p. 19, near foot.

The state of the evidence does not warrant the assumption that these endorsements and instructions by Fitch were made with the concurrence of McLaren & Co., if they were intended to prevent the immediate delivery to A. F. Smith & Co.

If authorized, inasmuch as by their terms they were to come into operation after the possession had passed to the consignees, they were inoperative except as conditions subsequent, or matters of contract, which could not affect the title.

See the endorsement on bill lading "Kate Kelly," and letter of Sep. 2, on p. 13.

Endorsement on B. L. "Grenada," pp. 8 and 9.

Letter of Fitch of Sep. 13, 1869, pp. 9 and 10.

Endorsement on B. L. "Corsican," on p. 16.

Letter of Fitch, Sep. 28, on pp. 16, 17.

The usual passage of a sailing vessel between Oswego and Milwaukee was 10 to 15 days. Mail 3 days (McLaren, foot of p. 37.)

The invoice "Kate Kelly" cargo was received in a letter of Wm. P. McLaren & Co., of 2d Sep., 1869, to A. F. S. & Co., in which they say, "We enclose invoice of 'Kate Kelly' cargo, and have drawn as noted."

A. F. S. & Co., in reply dated Sep. 4, 1869, say "Your favor 2d instant, enclosing account purchase wheat for 'Kate Kelly' is at hand and noted. The acct. will have attention.

These letters on p. 96.

The drafts against this cargo were enclosed by the Merchants' Bank, Sep. 6, 1869, to A. F. S. & Co., in a letter of that date, and the sight draft, $4,080.81 and N. Y. Ex., was paid, and the time drafts, one for $7,500, due Oct. 5, and one for $7,500, due Oct. 20, accepted.

The first time draft was paid.

Moffit, p. 47–40.

Invoice "Granada" was received in letter of W. P. McLaren & Co. to A. F. S. & Co., of 11th Sep., 1869: "We enclose invoice of cargo Schooner "Grenada," which sailed Saturday, P. M., and have to advise our drafts on you as noted. The sample goes by express to-day, and we think will suit."

This is acknowledged by A. F. S. & Co., in letter to W. P. McL., date Sep. 14, 1869. "Your favors of 8th, 9th, 10th and 11th rec'd, and contents fully noted. Your draft against 'Granada' cargo will have attention on receipt. *We are entirely out of wheat, the 'Kelly' not having put in an appearance yet.*"

These letters on p. 111.

The drafts against "Granada" were enclosed by Merchants Bank to A. F. Smith & Co. on receipt by it Sep. 16, 1869, and the sight and exchange was paid. $1,232 24

And the time, due Oct. 16th, for..... 8,000 00

And the time, due Oct. 31st, for..... 8,000 00

were accepted.

Moffitt, foot of p. 49 and 43.

Invoice "Corsican" was received in letter of W. P. McL. & Co., Sep. 26, 1869: "Enclosed find invoice cargo 'Corsican,' and we advise our draft on you as noted. The rate of exchange may look high, but the rate is bid up by others trying to get accommodation outside their own banks."

This is acknowledged by A. F. S. & Co., in their letter of Sep. 29, 18 9, to W. P. McL. & Co., "We have your favor of Sep. 25 and 27, both here to-day, the latter containing invoice of 'Corsican' wheat. The drafts will be duly honored."

These drafts came from Watertown to Oswego from the Merchants' Bank, to A. F. S. & Co., in a letter from Moffitt, date Oct. 1, 1869. The sight draft for $4,422.93 and ex., was paid. The time drafts, one for $6,000, due Oct. 30, and one for $6,000, due Nov. 14, 1869, were accepted.

Moffitt, p. 50, p. 44 in fo. 49.

When these vessels arrived at Oswego the captains found at the office of A. F. Smith & Co., orders which had been sent there by the Merchants' Bank from Watertown, in advance of their arrival, for the delivery of the cargoes at the warehouse of A. F. Smith & Co.

The following is a copy of the order for delivery of cargo "Kate Kelly:"

NORRIS WINSLOW, Banker. J. F. MOFFITT, Cashier.

MERCHANTS BANK.

WATERTOWN, N. Y., *Sep.* 6, 1869.

ROBERT HAYES, Esq.

Master schooner "Kate Kelly," Oswego, N. Y.

Dear Sir,—Please deliver to the Corn Exchange Elevator, Oswego. N. Y., your cargo of 8,727 bushels of amber Milwaukee wheat, and 5,527$\frac{30}{60}$ bushels of No. 1 amber Milwaukee wheat, consigned to us by W. G. Fitch, Esq., Cashier. Yours, respectfully,

J. F. MOFFITT.

(See foot p. 41, also on p. 48.)

The above was from an original produced. The others are from copies or memory as follows: Order for delivery of cargo "Granada."

NORRIS WINSLOW, Banker. J. F. MOFFITT, Cashier

MERCHANTS' BANK,

WATERTOWN, N. Y., *Sept.* 16, 1869.

A. D. MCINTYRE,

Master Schooner "Granada," Oswego, N. Y.

Dear Sir,—You may deliver your cargo of 14.500 bushels No. 1 Amber Mil. wheat to the Corn Exchange Elevator o Oswego, N. Y., for account W. G. Fitch, Cashier, and subject to order of this bank.

Yours respectfully,

J. F. MOFFITT.

(Moffitt p. 43.) Wheeler, owner of the "Granada", as to receipt of the order, substantially like the order marked Ex. No. 2 "Kate Kelly" on p. 53, then from memory on a copy being shown him, he swears he thinks it substantially the same, and the copy as above was read in evidence on p. 56.

"Order *for delivery* of cargo 'Corsica..' Norris Winslow, Banker. J. F. Moffitt, Cashier."

MERCHANTS' BANK,

WATERTOWN, N. Y., *October* 1*st*, 1869.

Master schooner "Corsican," Oswego, N. Y.

Dear Sir,—Please deliver to the Corn Exchange Elevator of Oswego, N. Y., your cargo of 13,400 bushels of No. 1

Amber Mil wheat for account of W. G. Fitch, Cashier, and subject to our order.

Yours respectfully,

J. F. MOFFITT, *Cashier.*

(See Moffitt on page 45.)

These last orders are read by the plaintiff's counsel as if they were orders to deliver the wheat to the elevator on the elevator's receipt of it, for account of W. G. Fitch, Cashier, subject to the order of the Merchants' Bank.

This is disingenuous. As addressed to the masters of the vessels holding the wheat under bill lading expressed for account of W. G. Fitch, Cashier, subject to the order of Merchants' Bank, they are of the same import as the order for delivery of cargo "Kate Kelly," and were so understood by the captain. (See Wheeler on p. 53, fo. 57).

"Cargo for account of W. G. Fitch, Cashier, and subject to the order of this bank," is merely descriptive of the cargo shipped.

There were certain letters proved from letter-press copies kept at the Bank of Watertown which had been cut out of the books which gave the written part, of which no files were kept at the warehouse, which appear to have been mailed by the Watertown Bank to A. F. Smith & Co.

They are found on p. 145 annexed to the deposition of N. Winslow, as follows:

EXHIBIT J. F. M., No. 1, A. B. G.

Sept. 6th, 1869.

PROPRIETORS OF CORN EXCHANGE ELEVATOR,
Oswego, New York.

Dear Sirs,—Please find enclosed an order for cargo schooner "Kate Kelly" for 8,727 bushels Amber Milwaukee wheat, and 5,527 $\frac{20}{60}$ bushels No. 1 Amber Milwaukee wheat, to be delivered to you, and you will please hold the same subject to, and deliver the grain only on payment of the following drafts, to wit:

W. P. McLaren & Co., on A. F. Smith & Co., st., $4,080.81 exg.
" " " Oct. 5th, 7,500 "
" " " " 20th, 7,500 "

Yours respectfully,

J. F. MOFFITT, *Cashier.*

EXHIBIT J. F. M., No. 2, A. B. G.

Sept. 6th, 1869.

PROPRIETORS CORN EXCHANGE ELEVATOR,
Oswego, New York.

Dear Sirs,—Please find enclosed an order to deliver to you 14,500 bushels of No. 1 Amber Milwaukee wheat. This grain you are to hold subject to, and delivered only on payment of the following drafts, to wit:

W. P. McLaren & Co., on A. F. Smith & Co, st..$1,232.24 exg.
" " " Oct. 16, 8,000 "
" " " " 31, 8,000 "

Yours respectfully,
J. F. MOFFITT, *Cashier*.

EXHIBIT J. F. M., No. 6, A. B. G.

Oct. 1st, 1869.

A. F. SMITH & Co.,
Proprietors Corn Exchange Elevator,
Oswego, N. Y.

Dear Sirs,—I enclose herewith an order to deliver to you the cargo of schooner "Corsican," of 13,400 bush. No. 1, Amber Mil. wheat, consigned to us by W. G. Fitch, Cash., with instructions to hold the same until the following drafts are paid:

W. P. McLaren, & Co., on A. F. Smith & Co., st. $3,422.93 exg
" " " Oct. 30, 6,600 "
" " " Nov. 14, 6,600 "

Please hold for account accordingly.

Yours truly,
J. F. MOFFITT, *Cashier*.

The second order should bear date Sept. 16, 1869, which is the date of the delivery order addressed to the master of the "Granada."

Much stress was laid upon these letters being addressed, Proprietors of the Corn Exchange Elevator; or, A. F. Smith & Co., Proprietors of the Corn Exchange Elevator.

Moffitt, who wrote the letters, swears (on p. 48 in fo. 52,) that at the time he wrote the letters, he understood A. F. Smith & Co. to be the persons conducting the business at the Corn Exchange Elevator, but whether A. F. Smith &

Co., whom he understood to be the persons conducting the business, were the same A. F. Smith & Co., upon whom the drafts remitted for acceptance were drawn, he had no knowledge on the subject whether they were one and the same or not.

Norris Winslow swears (on p. 144) that the firm of A. F. Smith & Co., proprietors of the Corn Exchange Elevator, were the same A. F. Smith & Co. who were commission merchants and dealers in grain, doing business at the Corn Exchange Elevator, and the persons upon whom drafts, accompanying the bills of lading received from the Milwaukee Bank, were drawn, and they were known by him to be the same, in 1868, 1869.

The letters or instructions purport, that A. F. Smith & Co. were to hold the grain in their elevator, subject to the order of the Watertown Bank, if the drafts should not be paid, without any express provision for whose account and risk the grain was in the meantime to be held; but reference being had to the facts that A. F. Smith & Co. were the general owners who had paid sight drafts and, accepted time drafts against the grain, the plain intent and meaning of this delivery, was, that in the interim the wheat should be held by A. F. Smith & Co., in their own warehouse, for their own account and risk.

A delivery to A. F. S. & Co. to hold subject to the order of the Bank of Watertown if the drafts should not be paid, but in the meantime for account and risk of A. F. Smith & Co., would be in substantial conformity with the instructions of Fitch to the bank not to surrender the wheat to A. F. Smith & Co. until the drafts were paid, and *if the drafts should not be prompty paid, to hold the wheat for his account.*

See this instruction of Fitch on p. 13.

But for the arrangement under which the wheat went forward, developed by the evidence, that Smith & Co. were to have the immediate use of the wheat through the consignment to the Watertown Bank, under its responsibility, a de-

livery to A. F. Smith & Co. at their warehouse, under these orders, would be a delivery to them as owners, but upon the trust and confidence that they would not dispose of the wheat without providing for the payment of the drafts, or upon a condition subsequent; and probably this was what was intended between the Watertown Bank and A. F. Smith & Co., in the expectation that they would apply the proceeds of the wheat in the payment of the drafts, and no doubt Smith & Co. so intended.

The "Kate Kelly" arrived at Oswego on the 15th Sep., 1869, and her cargo was delivered at the Corn Exchange Elevator, Sep. 16, 1869, by her master, upon the delivery order above set forth, dated Sep. 6, 1869, upon the payment of the freight by A. F. Smith & Co., and the receipt given by A. F. Smith & Co. to the Captain as his voucher for the delivery on the Captain's bill of lading. One of these receipts to the Captain is found on the Captain's bill lading so called, on. p. 55.

The grain was received into the elevating warehouse for account A. F. Smith & Co., Sep. 16, 1869.

The "Granada" arrived at Oswego on the 23d Sep., 1869, and her cargo was delivered at the same elevator, Sep. 24, 1869, upon the delivery order above, dated Sep. 16, 1869, upon the payment of the freight by A. F. Smith & Co., and a like receipt given to the Captain as his voucher for delivery.

This grain also was received into the elevating warehouse for *account* A. F. S. & Co., Sep. 24, 1869.

On arrival at Oswego of the "Corsican," her cargo was delivered at the same elevator, 1869, Oct. 8, upon the delivery order above, dated 1869, Oct. 1, upon the payment of freight by A. F. Smith & Co., and a like receipt given to the Captain as his voucher for delivery.

This grain also was received into the elevator for *account* A. F. Smith & Co., Oct. 8, 1869.

No warehouse or other receipts were ever taken by the

Merchants' Bank, nor did the bank ever, in case of any of these consignments, call on A. F. Smith & Co. for a receipt, or make any inquiry after the wheat until after A. F. Smith & Co had stopped payment.

That the grain in each case was received into the elevator for account A. F. Smith & Co., was proved by the entries from the grain book of A. F. S. & Co., showing that it was so received, which were put in evidence by plaintiffs, Ex. 42 on p. 87, as to "Kate Kelly" and "Granada;" Ex. 44 on p. 88 as to "Corsican."

In the absence of any evidence to the contrary it is a necessary presumption that the wheat was so received under some arrangement made between A. F. Smith and the Merchants' Bank.

Bickford swears, (at foot of p. 80 and on p. 81), that the freight was paid by A. F. Smith & Co., as the owners.

This was necessarily so.

Winslow swears that none of the banks at Milwaukee, consigning cargoes of wheat by bill lading, with drafts drawn on A. F. Smith & Co., made any arrangement with his bank or with him for the payment of freight. Nor did they put him in funds for the payment of freight on the cargoes on arrival at Oswego, or for payment of insurance after the cargoes were discharged, and it was not the course of his bank or of other banks so far as he knew to make advances for freight on cargoes consigned them. (On p. 144.)

And Bickford swears that it was not the course of business at the Corn Exchange Elevator, in case of receipt of grain from Lake vessels simply for storage or trans-shipment, to advance or pay the freights, nor unless the cargoes were owned by or consigned to A. F. Smith & Co.

When grain was simply stored for other parties they never paid freight. (On p. 81.)

Such a thing as a merchant advancing or paying freight on goods placed with him in his warehouse simply for storage, without some arrangement or request upon which the party storing could be charged, is not to be assumed.

And the turning over of this property to A. F. Smith & Co., without any such arrangement or request, is evidence that the delivery was made to them as owners, who would pay it for the protection of their interest.

A. F. Smith & Co. then, after the delivery of the wheat into the warehouse on orders from the Watertown Bank, were in the rightful possession of it in their warehouse as the owners, holding for their own account and risk, under the obligation to pay the drafts which they had accepted; and no casualty to the wheat thereafter, could have relieved them from that obligation nor entitled them to a return of the freights which they had paid.

2. But, further, notwithstanding the network of form in the instructions, it is clear that the wheat was purchased and shipped for the immediate use of A. F. Smith & Co., and to be delivered to A. F. Smith & Co., on arrival at Oswego, before the maturity of the time drafts in each case through the Watertown Bank, under the arrangement for the consignment to that bank, as the consignee designated by A. F. Smith & Co., but upon its responsibility for the wheat if these drafts should not be paid.

This is evident from the terms of the orders under which the wheat was purchased and shipped, and the correspondence between W. P. McLaren & Co. and A. F. Smith & Co., and the proofs as to the arrangement for the consignment to the Merchants' Bank for the use of A. F. Smith & Co., or as a party in their interest, at their request, under the agreement of the Watertown Bank to be responsible to plaintiff for the wheat, if the drafts should not be paid, to which arrangement for such consignment, instead of a bank selected by the plaintiff in its interest, the plaintiff was a party.

The terms of the order and the correspondence show not only that the wheat was purchased and shipped to supply the immediate wants of A. F. Smith & Co., for their use and their local trade upon a credit, except as to amount

sight draft, for the accommodation of A. F. Smith & Co., of which they were to have the benefit, and under a state of market sometimes a little more and sometimes less favorable for the buyer, but whose general tendency was downwards, under the influence of reports as to new crop, and from Liverpool and New York, which were in the view of both parties.

This feature of the state of the market is strongly presented in the correspondence.

I collect the correspondence as necessary to the understanding of the case, omitting what relates to transactions in options by A. F. Smith & Co., at Milwaukee, through W. P. McL. & Co., not connected with these shipments in question.

(1) The letter and telegram dated Oswego, Aug. 28, 1869 (on p. 23 in McL. dep.; on pp. 92, 93, in dep. Bickford) referred to by McLaren in his deposition as the order under which the wheat shipped by "Kate Kelly" was purchased, is noticed above.

In this letter, as we have seen, A. F. Smith & Co. say: "We are almost out of wheat, need some just as soon as we can get it, but don't want to pay much more by propeller than by sail."

(2) William P. McLaren & Co. to A. F. Smith & Co.:

Office of W. P. McLAREN & CO.,
Commission Produce Buyers,
MILWAUKEE, 28*th Aug.*, 1869.

Messrs. A. F. SMITH & Co.:

Dear Sirs,—Your dispatch ordering purchase No. 1 shipped by propeller came in this P. M.

Owing in part to a steamer excursion on the lake this afternoon, there has not been any market this P. M., and business is entirely adjourned over until Monday. Propellers ask 16 cts. fit, an absurd figure, we think; but the W. T. Co. have no opposition, and are perfectly arbitrary, as we have before advised. No. 1 is exceedingly scarce, and it would take us a day or two to pick up a cargo, but it could probably be done in that time.

No propeller could be had before Wednesday, but a small sized sail vessel could be had probably, 10½c. freight.

We advise you in regard to this by night message as fully as possible, and will execute the order for S. O. [Sail for Oswego] early Monday.

We think it most unlikely we could get consignment of a 5,000 lot of No. 2 to help make up a cargo by sail. The owner thinks some of shipping, but not certain. The market closed this noon quiet but steady. No. 1 is nominally $1.29@1.30, bnt transactions not at all frequent. No. 2, $1.25½ cash; $1.21½ seller September last sales.

L'pool quoted 9/3 to 9/4; our private dispatch says: "Some quick dealers, selling from store, and this, with good harvest report, poor demand and fine weather, depress market, but we think an early reaction more than likely." Their chief reason for expecting this reaction (as we gather from former messages) is that they believe the fine weather giving them nice dry wheat has led farmers to overlook the blight, and which had its effect before the wheat ripened, and when they thresh it, it is thought the deficiency will become more apparent.

They also say most of the wheat now arriving in Liverpool is out of condition, and helps depress the market. We give these views for what they are worth.

Heavy rains for 36 hours past caused some advance today, but it has cleared off nicely again.

Yours truly,

WM. P. McLAREN & CO.

(3) Telegram from A. F. S. & Co., to W. P. McL. & Co., Aug. 30, 1868:

To W. P. McLAREN & Co., Milwaukee:

Ship soon as possible cargo "Africa" (No. 1 Spring Wheat) and cargo "Arabia" (No. 2 Spring Wheat). Look well to quality. Draw as before.

A. F. SMITH & CO.

(4) Letter A. F. S. & Co., to W. P. McL. & Co.:

OSWEGO, N. Y., *Aug.* 30, 1869.

Messrs. W. P. McLAREN Co.,
Milwaukee, Wis.:

Gentlemen.—Your dispatch of Saturday night received, and ship as soon as possible, cargo "Africa" and cargo "Arabia." Look well to quality; draw as before. We want this for our trade, and we say look well to quality, because there has been much inferior wheat shipped from Milwaukee, and yet inspected one (1) and (2) lately to what there was earlier in the season.

You will draw as before, margin sight, balance thirty (30) and forty-five (45) days, Merchants' Bank, Watertown.

Yours truly.

A. F. SMITH & CO.

(5) W. P. McLaren & Co. to A. F. S. & Co.

Office of W. P. McLAREN & CO.,
Commission Produce Buyers,
WILWAUKEE, 30 *Aug.* 1869.

Messrs. A. F. SMITH & Co.:

Dear Sirs,—Your telegram in reply to our message Saturday night, came to hand this A. M. We have to ask for some allowance if we can not handle orders so promptly as usual, as it is the hardest time in the whole year to do anything, and there is hardly enough wheat here to keep deliveries moving. * * * On looking into the exact position, we have decided that it is not likely that we could buy a cargo of No. 1 Wheat so as to get it shipped this week, and as there were orders for two more cargoes here this morning, No. 2 is by no means plenty either. We therefore have decided to charter a good sized vessel and put in say 4 to 5,000 bush. No. 1, (with a bulkhead) and the balance of No. 2, and have been judiciously picking up both qualities during the forenoon; have bought so far some 6,000 bush. No. 2 at 1.25 a 126, and 2,000 No. 1 at 1.28. We can not get any more No. 1 to-day, but will increase our purchases of No. 2 and telegraph charter, &c.

There was much more disposition to buy, and less to sell, for future delivery. * * Liverpool comes to us still dull and a little lower, but New York shows a firm market, and this caused cash wheat to close here firm and good houses scarce. We doubt if September wheat can be found much lower at *present*, certainly not unless foreign markets are quite weak.

Yours truly,

W. P. McLAREN & CO.

(6) W. P. McLaren & Co., to A. F. Smith & Co.

Office of W. P. McLAREN & CO.,
Commission Produce Buyers.

Messrs. A. F. SMITH & Co.:

Dear Sir,—We sent you message this noon that we had completed your cargo at about 1.32 for No. 1 and 1.28 for No. 2. * * We bought enough No. 2 to fill vessel up at 1.28.

We will get the "Kate Kelly" off in the morning, if all is well.

Yours, truly,

WM. P. McLAREN & CO.

(7) A. F. S. & Co. to W. P. McL. & Co.

OSWEGO, N. Y., *Sep.* 1, 1869.

Messrs. W. P. McLAREN & Co., Milwaukee, Wis.:

Gents,—Your favor of the 28th and 30th received; also several telegrams; all satisfactory; but as two of our office men are away for a short time, will not reply to them in detail. You may buy another cargo of No. 1 for *our local trade*, if possible, of the old wheat, *for we shall need it before the new can be ground.* If, however, it is difficult to get all No. 1 at once, fill cargo with part No. 2 and bulkhead, as this last cargo No. 1 will suit better if not over 3 to 5 cents dearer.

Draw Merchants' Bank 30 to 45 days.

Yours, truly, A. F. S. & CO.

(8) W. P. McLaren & Co., to A. F. S. & Co., enclosing the Invoice cargo "Kate Kelly."

Office of W. P. McLAREN & CO.,
Commission Produce Buyers.

MILWAUKEE, *Sept.* 2, 1869.

Messrs. A. F. SMITH & Co.:

Dear Sirs,—We have the impression that wheat is not especially good property at 1.30 for this month. It will take one of two causes to keep it at that or over; either continuous broken weather here keeping back receipts, or very strong markets abroad. We have quite expected this reaction in Liverpool, but have no idea that prices there will go very high; think about 10½ or so, which certainly will not afford 1.36 here this month. It may be, however, that they are really going still higher there.

Our weather is fine and wheat should move next week if the weather keeps at all good. * * We hardly looked for this reaction of Europe for a week or so, but our Greek friends there have lowered the market all they could to see a sudden turn to the other side.

We enclose invoice of "Kate Kelly" cargo, and have drawn as noted. * * Yours of the 30th here and fully noted.

Yours truly,
WM. P. McLAREN & CO.

(9) A. F. S. & Co. to W. P. McLaren & Co.:

OSWEGO, N. Y., *Sept.* 4, 1869.

Messrs. W. P. McLAREN & Co.:

Gentlemen,—Your favor 2d inst. inclosing account purchase of wheat for "Kate Kelly" at hand and noted. The ac. will have our attention.

Your draft $2,400 also in and paid. We did not understand till now that any portion of the cargo was in consignment. It is all right, however; we only wish it was more. *Our impressions in relation to wheat* coincide with yours, as previous letters will show. We think sales of $1.30 for September will be good, unless all should be disappointed in the receipts.

Yours truly,
A. F. SMITH & CO.

(10) A. F. S. & Co. to W. P. McLaren & Co.

OSWEGO, N. Y., *September* 6, 1869.
Messrs. W. P. McLAREN & Co.
Milwaukee, Wis.

Gentlemen,—We feel that with the present price of freight that wheat will not be laid down in this market and N. Y. at much less price than it is worth to-day. Hence we are willing to take a cargo or two or three for our *local trade now* at present prices of freights.

If you have not filled the other orders for the other load, please do so. Make it all No. 1, if possible to do so, and not be obliged to wait unitl freights advance, to fill up; we expect to see freights go up to 20 cents this Fall. What is Germany fevering about and what ails France?

Yours truly,
A. F. SMITH & CO.

(11) A. F. S. & Co. to W. P. McLaren & Co.:

OSWEGO, N. Y., *September* 7, 1869.
Messrs. W. P. McLaren & Co.,
Milwaukee, Wis.,

Gents,—Yours of the 4th at hand and noted. We think that with the increase in freights, insurance, &c., it will be well for us to put in a cargo or so more for our *local* trade now. You may, therefore, fill the order immediately and engage freight. We shall be very busy with barley very soon, and want to get our grain for local in, and be ready for what may present. We don't think wheat will be *much lower here until very late;* the increase in transportation will eat up all the decline in price in your market, we think. Take all No. 1 if possible; if not, one and two. Look well to quality.

Yours truly,
A. F. SMITH & CO.

(12) W. P. McL. & Co. to A. F. Smith & Co.:

Office of W. P. McLaren & Co.,
Commission Produce Buyers,
Milwaukee, 8 *Sept.*, 1869.

Messrs. A. F. Smith & Co., '

Dear Sirs—Your favor of the 6th here to-day and noted We agree with your views on the cost of wheat laid down East on present basis, freights, &c., yet there is about 10c. against a shipment to New York to-day, and *unless Liverpool improves there cannot be anything in a shipment.* We have dull advices from Liverpool to-day yet; but we rather think they will not let it go much under 10c. at present. The market opened dull to-day * * Having received your letter at 2.30 we had already taken 5,000 at 25½, and as we afterwards got your second telegram to fill in at about 25, we took all we could at $1.25, 13,000 bushels in all.

We shall report progress to-night by wires, and go on in the morning to buy balance if market permits. We will also go on with another cargo, as ordered in your letter. It will be difficult to get much No. 1, and we will have to bulkhead to get cargo at all promptly. We will draw as before, but our banks are beginning to feel the pressure for money to go into the country to move wheat, and the time is now coming when they will expect to do less and shorter time paper. *We will of course do all we can at any time, and think we can almost always carry a fair portion* of the cost of cargoes, at least long enough to get them to their destination, and this our bankers think is doing their share.

We agree with you in expecting higher freights, asking 12½ now.

Yours truly,
W. P. McLAREN & CO.

(13). A. F. Smith & Co. to W. P. McLaren & Co.

Oswego, N. Y., *Sep.* 9, 1869.

Messrs. W. P. McLaren & Co.,
Milwaukee, Wis.

Gents—We have your favor of 7th and note what you say. * * Fill up the load No. 1, and let it come without hanging. If the schooner "Granada" is there, would sooner load her than a strange vessel.

Yours truly,
A. F. SMITH & CO.

(This letter of Sep. 9 and A. F. S. & Co. of Sep. 7, are referred to as the orders to purchase cargo "Granada.")

(14). McL. & Co. to A. F. S. & Co.—a telegram in cypher, on p. 99.

(15) W. P. McLaren & Co. to A. F. Smith & Co.

Office of W. P. McLAREN & CO.,
Commission Produce Buyers.

MILWAUKEE, *Sep.* 9, 1869.

Messrs. A. F. SMITH & Co.

Dear Sirs,—We have advised you to-night of the purchase of cargo No. 1, the chartering of a vessel. She is the "Granada," 14,500 bushels capacity, to load this week; to-morrow, if possible. When we commenced this cargo, we fully expected to bulkhead, as we were afraid No. 1 was not in sufficient quantity to enable us to make an entire load of that grade; but fortunately we were the only buyers, and it being plentier than we supposed, although really scarce, we have bought between 10 and 11,000 bushels, costing 1.28½ and 1.29.

A report has been received of a *break* in the Welland Canal, *which would take a week to repair.* The captain of the "Kate Kelly" telegraphed here to get leave to transfer the cargo to the Welland Railway, but as her owner lives in Oswego, we told the agent to telegraph him to see you, as you were the best judge of the expediency of transhipment. We found, however, that a good many cargoes were being ordered transhipped, and we accordingly *telegraphed you that it seemed to us* doubtful whether anything could *be gained* by this operation, as the large business necessarily caused by the transhipment of several cargoes would probably occasion as much delay to your cargo as it would experience by waiting until the canal was repaired and the vessel go through, although, as previously remarked, the captain telegraphed that a week would be necessary. Such men usually exaggerate, and we hope it will be repaired sooner. The fair receipt to-day, with the prospect of much heavier shortly, and the fair weather, have depressed the market.

Yours truly,
W. P. McLAREN & CO.

NOTE.—The usual passage was 10 to 15 days. The shipment on "Kate Kelly" was made Sept. 1. The time drafts, dated Sept. 2, were at 30 and 45 days. Of what consequence was the delay of a week, if A. F. Smith & Co. were not to have it till the drafts came due and were paid?

(16) McL. & Co. to A. F. S. & Co.:

Office of WM. P. McLAREN & Co.,
Commission Produce Brokers,
MILWAUKEE, 18*th Sept.*, 1869.

Messrs. A. F. SMITH & Co.

Dear Sirs:—We have just got the bills lading of the "Granada," and will draw and send invoice on Monday. Her cargo is very nice, and having a little mixture of old wheat will not harm it at all.

The market opened strong, and went to $1.26½ for cash, No. 2; but as N. Y. closed not quite so strong, we fell back to $1.25 and $1.29 for 1 and 2 (rest as to option).

Yours truly,
WM. P. McLAREN & CO.

(17) Wm. P. McLaren & Co. to A. F. Smith & Co. (enclosing invoice "Granada):"

Office WM. P. McLAREN & Co.,
Commission Produce Buyers.
MILWAUKEE, 11*th Sept.*, 1869.

Messrs. A. F. SMITH & Co.

Dear Sirs,—We enclose invoice of cargo schooner "Granada," which sailed Saturday P. M., and have to advise our drafts on you as noted. The sample goes by Express to-day, and we think will suit.

It weighs 59½ full, and is choice wheat in every respect.

* * * * * *

The market opened strong, and the report of No. 2 being 10, Liverpool; when it was seen N. Y. was barely sustained. Under the news we weakened, and closed quite dull at $1.27. * * *

Our impression now is, that unless Liverpool goes over 10, and shows very decided strength, we will see our market a little lower.

Yours truly,
WM. P. McLAREN & CO.

NOTE.—The drafts in this case were dated Sept. 13, and the time 45 days.

Why express the samples if A. F. S. & Co. were not to have the wheat before maturity of the draft.

(18) A. F. S. & Co. to W. P. McL. & Co.

OSWEGO, N. Y., *Sep.* 14, 1869.

Messrs. W. P. McLAREN & Co., Milwaukee, Wis

Gentlemen,—Your several favors, 8th, 9th, 10th, 11th, received, and contents noted. Your drafts against "Granada"

cargo will have attention on receipt. We are entirely out of wheat, the "Kelly" not having put in an appearance yet. We look for her to-night some, but may be disappointed again. Don't intend to be out of wheat, if possible to avoid it. Our market dull; not much wheat here.

Yours truly,

A. F. SMITH & Co.

NOTE. Could anything be more absurd than the statement to McLaren, "we are entirely out of wheat, the 'Kelly' not having put in an appearance yet," except upon the supposition of the wheat being purchased and shipped for delivery to A. F. S. & Co. for his use, with the right to receive and dispose of it on the arrival of this schooner?

(19). A. F. Smith & Co., to W. P. McLaren & Co.

OSWEGO, N. Y., *Sep.* 15, 1869.

Messrs. W. P. MCLAREN & Co., Milwaukee.

Gentlemen,—We have your favor of the 13th and note contents. The account enclosed will have attention as also drafts when they come in. * * Yours truly,

A. F. SMITH & CO.

(20). A. F. Smith & Co., to W. P. McLaren & Co.

OSWEGO, N. Y., *Sep.* 22, 1869.

Messrs. W. P. MCLAREN & Co., Milwaukee, Wis.

Gents,—We feel considerably like taking another cargo No. 1, for our trade, and if freights are no higher than 12 cts., and you can draw as before, you may buy and ship another cargo. Draw through Merchants' Bank.

Yours truly,

A. F. SMITH & CO.

(21) W. P. McL. & Co. to A. F. S. & Co.

Office of W. P. MCLAREN & Co.,
MILWAUKEE, 24*th Sep.*, 1869.

Messrs. A. F. SMITH & Co., Oswego.

Dear Sirs,—We wrote you this P. M. and since then have your favor 22d, which is fully noted * * Our banks are getting closer daily in money matters, but we have made arrangements to ship another cargo as you wished us to do so, on time, as before. Bottom seems to have been touched for the present, and as Chicago was a little firmer at the close 5 P. M., we engaged the schooner "Corsican" now on her way from Racine, at 12c., and secured about half a cargo No. 1 at 1.18, the lowest point yet reached. We expect to have the cargo shipped to-morrow.

Yours truly,

W. P. McLAREN & CO.

(22) W. P. McLaren & Co. to A. F. Smith & Co.

Office of W. P. McLAREN & Co.
Commission Produce Buyers,
MILWAUKEE, 25th *Sep.*, 1869.

(Private,)

Messrs. A. F. SMITH & Co.,

Dear Sirs,—We wish to say a frank word to you in regard to time drafts. We do not say it egotistically, but only to state a fact, that our facilities for doing time paper are fully equal to any house here, and we are very glad to afford you all the benefit of it that we can. It has, however, been several times the subject of remark to us, by our bankers, that while we have been negotiating 30 & 45 day paper for you, shorter date and direct on Oswego, (which B'ks always prefer,) has been, every now and then, brought in to them by other houses, who have not the same claim to the accommodation we have. Now we certainly should not say one word in regard to whom you see fit to employ as agents here, were it not that your orders are coming in direct conflict with each other. For instance, at the time we offered our bank 30 & 45 day paper to-day, they are offered (by parties who do not keep acct. even with them,) 30 days paper on you, direct Oswego. Of course our bank accommodates us first, but you can see the effect. The other parties offer the better paper, and will pay almost any price to get it done, while we desire to keep rates moderate, and do the best we can for you.

We trust you will appreciate our intentions in referring to this subject. We know, if you were here, we could show you very readily how it affects your interests. We take the opportunity to express our thanks to you for the orders you have favored us with, and the very pleasant relations that have existed between us, and which we trust may long remain. We trust, when your market settles so as to show any fair prices, we shall have some good consignments for you this fall. Some of our friends fully intend to ship your way. We regret very much your clients have an apparent loss in the 25,000 bus. now held here, but it may yet turn out better. If they prefer transferring to an October option, to shipping when the wheat comes in, will make the charges light.

The "Corsican" clears to-night, but too late to finish invoice till next mail.

Yours truly,
(Signed,) W. P. McLAREN & CO.

(23) A. F. S. & Co. to W. P. McL. & Co.

Office of A. F. SMITH & CO.,
Proprietors of the Corn Exchange Elevator. Commission Merchants for the sale of all kinds of State, Western, and Canada Grain.

OSWEGO, N. Y., *Sep.* 25, 1869.

Messrs. W. P. McLAREN & Co., Milwaukee, Wis.

Gents,—Your several favors and telegrams are here and draft in, and paid, &c., &c., all of which we have not time to reply in detail, for the reason that our Mr. Bickford, who does the most of the corresponding, is away attending upon a sick father, and the writer has his hands full to answer all letters and telegrams, do the selling and financiering, and good deal of talking, as you are aware. All you have done is satisfactory, but you want us to do what we can't, viz.: sell "Kelly's" wheat for $1.32 and 40; we tried hard to-day, but could not get an offer; in hopes Monday to be able to report sale at 1.32 or over; everthing blue on account the N. Y. fandango yesterday.

Yours truly,
A. F. SMITH & CO.

(24) W. P. McL. & Co., to A. F. S. & Co.

Office of WM. P. McLAREN & Co.,
Commission Produce Buyers.

MILWAUKEE, 27*th Sep.*, 1869.

Messrs. A. F. SMITH & Co.

Dear Sirs,—Enclosed find invoice cargo "Corsican," and we advise our draft on you to-day, as noted; the rate of Ex. may look high, but the rate is bid up by others trying to get accommodation outside of their own banks. Mar. Ins. you will note is low, and we think the price of the wheat cannot be unprofitable; markets surely cannot go much lower; receipts will be affected even by present prices as soon as the first week is over, and we feel as if there must be something important deducted from the estimates of wheat crop in Minna., and Iowa, as late rains are said to have done immense damage. Altogether we feel pretty sanguine that bottom has been reached. * * * The market ruled dull for all but spot No. 2 (which is exhausted by shipments) but at the close stiffened, on the strength of closing New York reports showing active exports. * * *

Yours truly,
(Signed), WM. P. McLAREN & CO.

(25) A. F. S. & Co. to W. P. McL. & Co.

Office of A. F. SMITH & Co.,

Proprietors of the Corn Exchange Elevator. Commission merchants for the sale of all kinds of State, Western and Canada Grain.

OSWEGO, N. Y., *Sep.* 29, 1869.

Messrs. W. P. MCLAREN & Co., Milwaukee, Wis.

Gentlemen,— * * * We have your favor of the 25th and 27th, both here to-day, the latter containing invoice of "Corsican" wheat; will examine it, and if find any errors, will report; the drafts will be duly honored. * * * We fnlly appreciate your remark about drawing time, and you need not have any fears, but all you do for us is fully appreciated, and will be reciprocated, should any parties order us to buy wheat for them, living in the county, or what we take for local trade, we want through Watertown; but sometimes we get orders from here, or east of here, to take some, those lots we have drawn through Bks. here. We cannot appreciate the difference, whether your banks draw through banks here or Watertown; however, this is between us, and we shall hope to do very large business with you when things get settled; money very close here just now, and New York not yet certain where they are, but we think the most of them should be in States prison.* *

Yours truly,

A. F. SMITH & CO.

(The above correspondence is attached to deposition of Bickford from fo. 95, p. 92 to 107, verified by him on p. 73.)

There is nothing in the correspondence or in the letters enclosing the invoices, nor in the invoices themselves, advising of the drafts drawn against the several cargoes of wheat, from which it can be inferred that the payment of the time drafts after the acceptance, and payment of the sight draft, and the acceptance of the time drafts, was a condition precedent to A. F. Smith & Co. having the title and use of the property.

The sight drafts were paid, and time accepted in each case after receiving the invoice, advising of them from McLaren & Co., on presentation by the Watertown Bank by letter.

And no one can read the correspondence between A. F. S. & Co. and McL. & Co., without seeing that the wheat was purchased and shipped to be delivered to A. F. S. & Co. for their immediate use on the arrival of the lake vessels at Oswego.

But the meaning inferable from the arrangement (to which McL. swears on p. 37) that the wheat should be consigned to the Merchants' Bank as a consignee designated by A. F. S. & Co., from which they could procure accommodation, and through which they desired to do a portion of their business after McLaren & Co. had satisfied themselves of the responsibility of that bank, is that the wheat was to be delivered to A. F. S. & Co. on the responsibility of the bank for the wheat if the drafts should not be paid.

That this was the arrangement appears from the letter of the Merchants' Bank, of Sep. 11, 1869, (on p. 18) referred to above in answer to the letter of Fitch requesting the Watertown Bank to define its position, in which the bank says that "we will receive (until further notice) such consignments as you choose to send us, holding us responsible for the grain in case of non-payment of drafts."

To this arrangement for the delivery to A. F. Smith & Co. through the Merchants' Bank, the plaintiffs became a party by accepting the bills lading for the wheat under consignment to the Merchants' Bank, and transmitting and delivering them to that bank, and it is a gratuitous assumption of the plaintiff's counsel that Fitch did not know of the arrangement under which this consignment was made. If he had not known he would have inquired.

The consignment to a bank designated by the purchaser of the *wheat* is itself an exceptional transaction.

If the real intention had been that the wheat should not be delivered to A. F. S. & Co. until all the time drafts were paid, it would have been secured by the ordinary mode of a consignment to a bank selected by the plaintiff as its agent and in its interest.

The general question under the issue joined under the exceptions upon the effect of the evidence, documentary and other, are first, whether the plaintiff had any title or right to the possession after the transfer and delivery of the bill lading to the Merchants' Bank; and second, whether the possession of A. F. Smith & Co. in their warehouse, holding for their own account and risk, was such that the defendants could acquire title as *bona fide* purchasers by advances on consignment of the wheat to them by A. F. Smith & Co., in dealings by A. F. Smith & Co. with the wheat, as it was contemplated they should do on its purchase and transmission.

There are other questions involved, and leading to the above which can be more conveniently stated in the next division assigning errors.

II.—(1) Various schemes have been devised in Western New York and elsewhere West from time to time in sales of grain as merchandise, some of which are traceable in the New York Reports, and which have been the source of much litigation of which the object is to put the purchaser in possession for immediate use by sale or pledge, but surrounded by formalities which are only legitimate as a means of enforcing the obligations of the consignee or purchaser to provide for the payment by the application of the proceeds or otherwise; but which are a fraud upon third parties dealing with the purchaser on the faith of his possession, in their attempted use as a means to overreach the title of such third parties.

The transaction in question in this case is one of these schemes, more than usually complicated by formalities, of which the attempted use to overreach the title of the defendants and others dealing with A. F. Smith & Co. as *bona fide* purchasers, should appear to be a fraud which no Court of Justice should be expected to uphold.

(2.) With a view to shove the transactions in question from their true basis as purchasers of grain made and shipped in the Fall of 1869, to be delivered through an agency designated by A. F. Smith & Co. to that firm, for immediate use by sale or pledge as proved by the terms of the orders under which the purchases were made, and the correspondence in respect to these shipments under the arrangement for the consignment of the grain; the plaintiffs' counsel offered to read in evidence from the deposition of McLaren, prepared at Milwaukee, answers to questions (on pp. 36–37) to the purport that in transactions between Mr. Farwell as agent of A. F. Smith & Co., when in Milwaukee in the Summer or Fall of 1868, and again in the Spring of 1869 it was agreed between Mr. Farwell and Mc. Laren & Co. as to the arrangements of drawing time paper in *transactions with Farwell* as to through whom drafts should be sent, that when *Farwell* desired to designate the banks East through whom such drafts should be sent, McLaren & Co. agreed to send them and consign the property to any good, responsible bank Smith & Co. might designate; always stipulating that McLaren & Co. should adhere to their positive business rules in such cases, and on no account consent to any property so shipped to pass out of the control of the banks to whose care it should be placed, until all drafts made against it had been paid; that McL. & Co. should be satisfied as to the standing and responsibility of the banks that he might name; and that that arrangement was understood between McLaren and his firm and Farwell, to apply both in reference to particular shipments, and also in regard to the general business between McL. & Co. and Smith & Co.

This evidence was objected to by defendant's counsel, as not binding on Smith & Co. as to the transactions in question, in this case, and not relevant to the transaction in question.

The objection was overruled and defendants excepted.

We allege the admission of this evidence, under this exception thereto, as error.

Bickford, of A. F. Smith & Co., called for plaintiff, swears that A. F. Smith & Co. never authorized Farwell, to his knowledge, to make any engagement with any parties in Milwaukee; that the cargoes purchased for the account of A. F. Smith & Co. should not go in any way into their control until all the drafts on them were fully paid, or to that effect; and that A. F. Smith & Co. were never advised of any such arrangement.

Bickford on p. 76.

And the orders for the purchase, and the correspondence in relation to the shipments in question, including the letters enclosing the invoices, and the invoices advising of the drafts drawn, upon which the sight drafts were accepted or paid, and the time accepted, are conclusive to show that any such holding of these particular consignments would have defeated the object in view, in the purchase and shipment for delivery, through the Merchants' Bank, to supply the immediate needs of A. F. Smith & Co.

The object of any arrangement between the parties for a consigment to a bank, designated by the purchaser, after the purchasing agent has satisfied himself of its responsibility, on its face is an arrangement for the delivery, pursuant to the terms of the contract, to the purchaser, under such responsibility to the consignor on the part of the consignee bank, as implied from the nature of the transaction, or as defined by special agreement, in this case, on its responsibility for the wheat, if the drafts should not be paid.

Any consignment to a party designated by the purchaser as the consignee, should be held to place the goods at the disposal of the purchaser, at least as to third parties.

Even as between the parties, reference being had to the object in view of both commission buyer and the purchaser, in the purchase and transmission of the wheat for delivery for the immediate use by sale or shipment of A. F. S. &

Co., the documentary and formal instructions of the plaintiffs are to be regarded only as in aid of the enforcing of the obligation assumed by the Watertown Bank, and the letters of the latter to A. F. S. & Co., as in aid of enforcing the responsibility of A. F. S. & Co., to wit, by reason of its engagement to the plaintiffs, without supposing that these were intended to defeat the object of the purchase and transmission of the wheat.

Under the circumstances of the purchase and transmission of the wheat to A. F. S. & Co., for immediate use, through their own bank, and the confidential and pleasant relations that existed between them and McL. & Co., who were soliciting their orders, and the confidential relations between them and their bankers, it never occurred to them that there was anything in the formal notices from the bank to prevent their selling this wheat as their own, in conformity to the object and purpose of the consignment under their orders, and there was nothing. (See Bickford, on p. 80.)

In paying the freight, effecting insurance, taking upon themselves the risk of the property under their liability on their acceptances, and in selling to raise money to pay acceptances, they were acting in the interest of the Watertown Bank, under its engagement to be responsible for the wheat to the plaintiffs, if the draft should not be paid.

And that bank has never complained of them for doing as they did.

At the time of their suspension, which no one has ever alleged was fraudulent, they had paid on cargo "Kate Kelly," including freight $13,206 24
On the "Granada" 5,472 24
On the "Corsican" 5,030 93

(3) After the plaintiff had rested, the defendants proved the shipment at Oswego on board each of the four canal boats, from the possession of A. F. Smith & Co., under the several bills of lading, showing a shipment by that firm for their account, under consignment to defendants as

the consignees in New York, and the transmission of the same with the sight drafts attached and accompanying documents, and the payment of the drafts on the delivery of the bills lading with accompanying documents, as above set forth, and offered them in evidence.

The plaintiffs' counsel inquired for what purpose these bills of lading and drafts were offered in evidence.

The defendants—For the purpose of showing title in the defendants as consignees, by reason of advances made on consignments by bills lading of the wheat shipped by A. F. Smith & Co. to the defendants, in connection with evidence that such advances were made in the usual course of business and *bona fide*, and without notice of any claim of the plaintiffs or of any other person thereto except A. F. Smith & Co.

The plaintiffs' counsel objected to the reception in evidence of any of the said canal bills of lading and drafts for the purpose for which the same were offered, and after argument in support of his objection on the effect and intent of the documentary and other evidence which had been received, which is set forth in full in the bill of exceptions, in maintenance of the proposition that the plaintiff had acquired a prior title to the wheat, which it had not lost, and that A. F. Smith & Co. had no title or possession which was available as a source of title to the defendants as *bona fide* purchasers by reason of the advances in payment of the sight drafts on delivery of these canal bills lading, and argument of defendants' counsel in opposition and in support of the defendants' claim of title, the Judge in his conclusion as to the effect of the documentary evidence, particularly the letters of instruction, excluded the testimony offered, and the defendants excepted.

See on pp. 156 to 158.

The defendants, assign this exclusion of this evidence, which disposed of the whole question of plaintiffs' claim of

title in its favor, and denied that defendants had any ground of title on the evidence as presented in the case, as error.

(4) The Judge, on leave, asked to put in evidence the same documents, for the purpose of showing a transfer to defendants of the title of A. F. Smith & Co., as the genera owners, as bearing upon the question of the measure of damages: ruled and decided that it would receive the evidence for the purpose of showing that the defendants had good title as between themselves and A. F. Smith & Co., and as bearing on the question of how much should be recovered as damages.

The bills lading, &c., of defendants were then put in evidence under this limitation. See p. 158.

The defendants offered further evidence of *bona fides* which the Judge rejected, saying, that he did so because if the views he had already expressed should govern in the case, they proceed upon the assumption that the defendants acted *bona fide* without knowledge or notice of anything to put them upon inquiry touching the matter. The good faith of defendants will be assumed.

This is referred to as showing that the case was disposed of by the Judge on the assumption that the defendants acted *bona fide.*

(5) The only evidence of damages which the plaintiffs had given being the gross proceeds of sale in the City of New York, without deducting freight or charges, the defendants proposed to prove the charges paid. The plaintiffs objected and the Judge sustained the objection and excluded the testimony. Defendants excepted.

See pp. 148–160.

This is assigned as error.

(6) The defendants offered to read in evidence from the deposition of David Mannering as to the character and uses of the elevating warehouses in Oswego, the business of A. F. Smith & Co., and the purposes for which they, as proprietors of the Corn Exchange Elevator, used that elevator

as therein, on pp. 161, 162, for the purpose of ascertaining and helping to interpret the arrangement or orders for the delivery of the wheat at the Corn Exchange Elevator; and they also offered the evidence, as in said deposition, of the general usage at Oswego, on consignments to banks by B. L. to place the wheat on arrival at Oswego in elevating warehouses of the commission merchant or dealer in grain on whom the drafts are drawn, after acceptance of the drafts, as bearing upon the question of authority of the Watertown Bank to order the delivery of the wheat in question to the Corn Exchange Elevator of A. F. Smith & Co., and of the purpose for which it was so ordered; and for ascertaining the meaning and helping to interpret the meaning of the orders for the delivery of the wheat into the elevator.

The evidence was excluded, and defendants excepted. See on pp. 161 to 163.

The exclusion of this evidence is assigned as a further error.

(7) The defendants' counsel presented to the Court the requests found on pp. 163 to 165.

(8) The summing up was confined by the Judge to the question of the identity of the wheat claimed on board each of the several canal boats, with the wheat on the lake vessels covered by the lake bill of lading, under which the plaintiffs claimed, and the amount of damages which the plaintiffs might be entitled to recover (p. 165, at fo. 165.)

The Judge, after the summing up by the counsel thus confined, made an impressive argument on the question of title, amounting to a direction to the Jury to find a verdict for the plaintiffs.

The defendants excepted to the charge, as amounting to a direction to the Jury to find a verdict for the plaintiffs.

It is submitted that the direction is founded upon an entire misapprehension of the effect of the evidence, and the defendants assign this direction as error under the exception.

(9.) The exclusion by the Judge of the evidence offered by defendants as to source of title, on grounds which assume that the title of the plaintiff, was incontestible on the evidence in the Bill of Exceptions, and that defendants could not acquire title as *bona fide* purchasers, it is submitted, leaves the whole question of title open, under the exceptions to such decision.

For greater caution the defendants presented certain requests to the Judge, some of which would have, of course, been unavailing, and are unnecessary under the limitation, by the Judge, of the summing up to the questions of identity and amount of damages, and under the direction in effect as matter of law, that plaintiffs had title anddefendants could not acquire it.

These requests are found on pp. 163, 165.

(10) The defendants assign as error, under the exception in that behalf, on p. 170, the Judge's not allowing the defendants to go to the jury, and giving the instructions in the 1st request.

Also as to the 2nd request.

Also as to the 3d.

Also, for not charging as requested in the 7th request, as to the damages.

Also, for not charging as in the 9th request.

Also for not charging as in the 10th.

Also for not charging as in the 11th.

Also for not charging as in the 13th.

Also for not charging as in the 14th.

Also for not charging as in the 16th.

(11.) The Judge was requested to charge that the allowance of interest upon the value of the wheat in question was in the discretion of the jury; the Judge refused so to charge. Defendants excepted on p. 170.

This exception is insisted on.

POINTS.

FIRST.—The exception to the admission in evidence of the testimony of McLaren to arrangements with Farwell in transactions between McLaren & Co. and Farwell as agent of Smith & Co., in 1868, and in the Spring of 1869 as not binding on A. F. Smith & Co., or relevant to the transaction in question above assigned as error [II. (2)] was well taken.

SECOND.—This being an action of trover, plaintiff was bound to show a complete property, general or special, in the wheat or they could not recover; 1 Ch. Pl., 7 Am. Ed., p. 170; 2 Saund., 47 A., Note 1; Brown on actions at law, 426; Dillenback *v.* Jerome, 7 Cow., 294; Hotckiss *v.* McVickar, 12 John, 403.

When this action was commenced, they had no property, general or special.

THIRD.—The transmission of the invoice on the shipment to the consignment of the Merchants' Bank in accordance with the contract on its acceptance and compliance with its conditions, was an appropriation by the acts of both parties, of the wheat shipped to the use of A. F. S. & Co., which passed the property.

Richardson *v.* Dunn, 2 Ad. & Ellis, N. S., 217.
Alexander *v.* Gardner, 1 Bing, N. C., 671.

This invoice, which has the strength of a bill of sale, was documentary evidence of title placed in the

hands of A. F. S. & Co. as the purchaser, whereby their right in the wheat shipped upon acceptance and payment of the sight, and acceptance of the time drafts as noted in the invoice was acknowledged, and whereby they were furnished with the means of asserting that right against and authorized to receive the wheat on delivery through the Merchants' Bank for their own account.

See what is said by Johnson, J., delivering the opinion of this Court, of the invoice as a document of title in the claim of W. & I. Wilkins in the case of the Merrimack, 8 Cr., 318, 329–330, where the B. L. was made out to a third party.

Conceding that this property of A. F. Smith & Co. was subject to a possessory right or legal title, and right of possession acquired by the plaintiff by the delivery to it of the B. L. for the wheat under consignment to the Merchants' Bank, with the drafts attached, on its discounting them, such as was contemplated, this possessory right or legal title and right of possession was transferred to the Merchants' Bank on transmission and delivery of the bill lading to the latter; such transmission and delivery of the B. L. being in furtherance of the arrangement that the property should go forward on consignment to that bank, as the consignee named by A. F. Smith & Co., for delivery to A. F. S. & Co., and upon the agreement of the latter bank that it would be responsible for the wheat if the drafts were not paid; and thereafter the latter bank had the legal title and right of possession in trust for A. F. Smith & Co. as the general owner, and the plaintiffs had neither a general or special property in the wheat.

FOURTH.—Since the case of Lickbarrow and Mason, the doctrine has been universally accepted that the trans-

mission and delivery of a bill lading to the consignee, or the endorsement of it for a valuable consideration, without notice to the consignee or endorsee of any title better than that of the consignor or endorser passes the property.

In the cases of Dows *v.* Rush, 28 Barb., 158, and Dows *v.* Greene, 24 N. Y., 638, the B. L. showing a shipment by Niles & Wheeler for account Mack, care Dows & Cary, New York, was in the same form as the plaintiffs, and it was held in those cases that the delivery of the bill by Mack, with such consignment, to Dows & Cary for an advance thereon, transferred the title to the property.

In Wilmshurst *v.* Bowker, Ex. ch. 1844, 7 Man & Granger, 882, where bill lading and invoice was transmitted to the consignee upon his agreement to remit by bank draft, after receipt of the bill lading and invoice, it was held by the Court reversing a considered judgment of the Court of Common Pleas, that the title passed, although the consignee did not remit, the agreement, to remit being in the nature of a condition subsequent which could not affect the property.

The transfer and delivery of the B. L. by plaintiff, in consideration of the absolute agreement of the Merchants' Bank to be responsible for the wheat if the drafts were not paid, was as effectual to pass the possessory right or legal title and right of possession to that bank.

The instruction thereon, and in the letters in respect to the disposition of the wheat after the title had passed, could have no operation except as matter of contract or condition subsequent. They would not affect the property.

FIFTH.—Aside from this defect of title, the wheat in question having been purchased under orders for immediate

use, and on a credit, and shipped for such use, as the correspondence shows, by a delivery to be made through the Merchants' Bank, under the arrangement between A. F. S. & Co. & McL. & Co., were the instructions endorsed on the bills and conveyed in letters by Cashier Fitch, after he had accepted them under consignment to the Merchants' Bank authorized?

The question is not what McLaren might have done on the shipment with a view to retain the control contrary to the contract before he had put the property at the risk of A. F. Smith & Co., but what Fitch could do after that had been done.

In Lamphear *v.* Blossom, 1 Louisiana Annual Rep., 148, it was held that when a Bill of Exchange, drawn on a shipment, and payable a certain number of days after sight, is sold with the bill of lading appended to it, the holder of the Bill of Exchange cannot in the absence of proof of any local usage to the contrary, or of the imminent insolvency of the drawee, require the latter to accept the Bill of Exchange but on the delivery of the bill of lading.

The doctrine of this case, in its application to a case where the bill is taken to the order of the consignee and is to go forward, and is transmitted to the consignee designated by the purchaser in the arrangement for the purchase, stands upon the plain obligation of the contract, however it may be when the bill is taken to shipper's order on the shipment, and is endorsed to the purchaser of the bill.

The case of the "Constantia," 4, C. Robinson, is a direct authority that such instructions in the stage of the transit, when these instructions were endorsed on the bill, were unauthorized, except as a means of exercising the right of stoppage in *transitu* in case of insolvency.

And if unauthorized, Smith & Co. accepting and

paying the sight and accepting the time drafts, as promised on the receipt of the letters with the invoices, and on the faith of the latter, which called for nothing beyond such payment, were under no obligation to pay any attention to them.

If there had been any reservation or condition that the wheat should be held according to the literal import of these instructions, inasmuch as this would have defeated the object of the purchase and shipment, it should have appeared in the correspondence or on the face of the invoice.

SIXTH.—A. F. Smith & Co. in possession of the correspondence containing the contract for the purchase for their immediate use, and on a credit, and the invoice with the letters enclosing them, showing a purchase and shipment for their account, with no other condition than the acceptance or payment of the sight and the acceptance of the time drafts, and knowing that it was shipped under their arrangement with McL. & Co. for delivery to them through the Merchants' Bank as their bank, and under the agreement of that bank to be responsible for the wheat if the drafts were not paid, might conclude either that these instructions of which they were notified were unauthorized, or were intended to secure the responsibility of the Merchants' Bank to plaintiff on its engagement so to be responsible to it, which was made in reliance upon their A. F. S. & Co.'s responsibility, or that the object of these instructions was to secure the appropriation of the proceeds in payment of the drafts. But certainly no one of mercantile education or ordinary sagacity in their situation, under the circumstances would infer that the intention was that the wheat

should be held according to the literal import of these instructions until the time drafts matured and were paid, for this would defeat the very object and purpose of the purchase and consignment for their immediate use.

Accordingly A. F. S. & Co., who were merchants of good reputation and credit, after the receipt of the invoices and the acceptance and payment of the sight, and acceptance of the time drafts as called for by it, received the wheat at their warehouse for their own account on delivery upon the orders from the Merchants' Bank, shipped some of it on sales to their customers by cars to Watertown, sold other of it to millers in the neighborhood, and made consignments of other portions to New York by bill lading with drafts attached for advances in the most open way.

They did this in a course of business in purchasing wheat for their own account at Milwaukee, amounting to from two to three millions of bushels in all in the years 1868 and 1869, which was as follows:

When the vessel at Milwaukee received the wheat, a bill of lading was taken from the captain for the wheat on consignment to the Merchants' Bank, with the plaintiff substituted for the commission buyer as the consignor, as was contemplated and pursuant to the agreement between A. F. S. & Co., and the Produce commission buyers that it should be consigned to that bank, as a consignee designated by A. F. Smith & Co., without any endorsement upon it, a clean bill; the vessel went forward to Oswego, and called at the warehouse of A. F. Smith & Co. for and received an order from the Watertown Bank for the absolute delivery of the wheat shipped for acct. Fitch, cashier, under consignment to or to the order of the Watertown Bank for delivery to the Corn Exchange Elevator, the warehouse of A. F. S. & Co.; on this order delivery

was made at the warehouse, the freight was paid and receipt given to the captain for the wheat by A. F. Smith & Co., who received it in their own warehouse for their own account, disposed of it as their own without waiting for the maturity of the time paper, and paid the drafts as they came along without any inquiry being made from the Merchants' Bank in regard to the disposition of the wheat in the mean time, in any case, until after the suspension of A. F. Smith & Co.

But on that event happening, without other provision for the payment of maturing drafts, except the responsibility of the Merchants' Bank, the endorsement on the bills lading by Fitch, and letters of instruction which had been all tne time in the vaults of the Merchants' Bank at Watertown, 40 miles distant, out of sight of everybody, were brought out and the letters of that bank to Smith & Co., enclosing the orders for delivery of the wheat, were hunted up, which were put in evidence after having been submitted to counsel to use as a means of overreaching the title of parties who, as purchasers and consignees, had dealt with Smith & Co. in the manner contemplated in and by the purchase and shipment for the use of A. F. Smith & Co.

But until the failure of Smith & Co. all that was or could be seen by the outside world, including the captains of the vessels, was the shipment under clean bill of lading to the Watertown Bank, the delivery to the warehouse of A. F. Smith & Co., at Oswego, on arrival of the vessel there on unconditional orders, the receipt of the wheat at the warehouse for account of A. F. S. & Co., and the immediate or as called for disposition of it by sale and consignment for account of A. F. Smith & Co. to *bona fide* purchasers and consignees.

Upon the exhibition on the trial of these formal instructions and notices, the Judge disposed of the question of title in favor of the plaintiff and in rejection of the defendants' claim to title upon the strength of these formal papers, without any reference to the objects in view in the purchase and shipment of the wheat, the relations of the parties, what was proposed by the arrangement for the delivery to A. F. Smith & Co., through the Watertown Bank, on its responsibility for the wheat if the drafts were not paid, and the tendency and effect of this arrangement and combination, coupled with the objects in view, showing an intention to give Smith & Co. the use of the wheat to raise money to pay for it, on the responsibility of Smith & Co.'s Bank, and on its agreement to be responsible for the wheat if the drafts were not paid, upon which Smith & Co. acted; but at the same time to surround it with such security as there was in these letters of instructions, so handled as not to affect the credit of A. F. Smith & Co., or to interfere with his disposition of the wheat by their exposure to outside parties.

In this we submit the Judge committed an error and an injustice to the defendants.

The argument of the plaintiff's counsel against this, that the consign ment, so far as the plaintiff was concerned, was a consignment to a special agent of its own selection, with limited authority, goes upon a misconception of the nature of the transaction.

What the plaintiff did, was to transmit the B. L. to the consignee designated on it when it received it, under the arrangement between McL. & Co. and A. F. S. & Co., for the delivery to A. F. Smith & Co., through that consignee, looking to the responsibility of that consignee for its security and upon the agreement of that consignee to be responsible for the wheat if the

drafts were not paid, and with knowledge of the purposes and objects of the arrangement for the delivery through the Merchants' Bank; and in furtherance of its objects, unless it can be supposed that Cashier Fitch would accept the B. L. for the wheat to be delivered to this consignee without inquiring how it came to be so consigned, and under what arrangement and for what purposes.

SEVENTH.—Looking at the object manifested by the terms of the purchase and sale, bought and sold for the immediate use of A. F. S. & Co.; at the object disclosed by the nature of the article which was the subject of the sale, wheat which is bought and sold for consumption and manufacture and not to hold, old wheat at that, just as the new crop is coming in as mentioned in the correspondence, as was known to all the parties; at the object of a credit 35 to 45 days, which was stipulated for as a condition of the purchase of each cargo in the view of all the parties; and the object in the transmission to a consignee designated by the purchaser as a facility to him who was willing to be responsible for the wheat, if the drafts were not paid, as plaintiff was advised, and who did agree thereto, it is incredible that the real intention was not that Smith & Co. should have the use of the wheat to pay the drafts.

If this was not the intention as between the parties, it is evident that it was not the intention that this should be known outside of the circle of the bank officers.

This is evident from the manner of the transmission from Milwaukee under bills lading, which, when taken from the captain had no special directions or instructions written upon them, and from the manner of the

delivery by the captains on orders from the Merchants' Bank of the wheat shipped for account Fitch, Cashier, to its order for an unconditional delivery to the Corn Exchange Elevator of A. F. Smith & Co., and so the wheat was so transmitted and delivered that no one who had not access to the private files of the bank at Watertown, or to the private files of A. F. Smith & Co., could know anything of these instructions of Fitch to the banker of A. F. Smith & Co., or of the letters of that bank to A. F. Smith & Co. enclosing the delivery orders from the captain.

Under the circumstances no one can fail to see that by the circumstances of the purchase and sale, and transmission and delivery at the warehouse of A. F. Smith & Co. of the wheat after they had accepted and paid sight drafts, and accepted time drafts as called for by the contract for the sale, and the invoice that that firm would naturally be, and were led and authorized and enabled to receive the wheat in the elevator for their own account, and to dispose of it by sales and consignments East and West, and South, as contemplated by the object and circumstances of the purchase and transmission to them from Milwaukee, through the Merchants' Bank; and that being so, they had at least an authorized, apparent or ostensible possession and control as the owners, and such authorized ostensible possession and control would protect parties dealing with them as *bona fide* purchasers, or in the receipt of consignments for advances.

By the law of the State of New York, when the owner of property or goods or choses in action not negotiable, confers upon another only an apparent title or power of disposition over it, he is estopped from asserting his title as against an innocent third party who

has dealt with the apparent owner in reference thereto, without knowledge of the claim of the true owner.

McNeil *v.* The Tenth National Bank, 46 N. Y., 325

Moore *v.* Metropolitan Bank, 55 N. Y., 41.

Pickering *v.* Buske, 15 East., 38.

EIGHTH.—The claim of the defendants to protection, stands on as strong a ground or stronger than that of a *bona fide* purchaser from mortgagor in possession of merchandise with power of control under an unrecorded mortgage, as in Thompson *v.* Blanchard, 4 Coms., 303, or of a *bona fide* purchaser from a vendee in possession obtained by fraud, as in Paddon *v.* Taylor, 44 N. Y., 371, or McCombie *v.* Spader, 3 N. Y. Supreme Court Reports (Edited by Thompson & Cook, A. D. 1874); or of the holder of a B. L. for wheat from a purchaser into whose boat wheat had been discharged from an elevator, thereby ascertaining the weight or quantity, a necessary preliminary to the passing of title in sales by weight or measure, to whom such delivery was made under an order on the elevator to deliver the wheat, subject to the order of the seller until paid for, so as to retain the legal title.

This last was the case of Rawle *v.* Deshler, 3 Keyes, 575; S. C., 28 How. Pr. R., 66.

See also cases of chattel mortgages on goods in store.

Griswold *v.* Sheldon, 4 Coms., 581.

Edgell *v.* Hart, 5 Seldon, 213. Ford v. Williams 24 N.Y. 359.

3 R.S.N.Y. 5 Ed. 222, 2d Q. 10-
Com. Dig. Comin (A); (B 1); (B. 3.)
Viners Abr. Fraud L. pl 4.

NINTH.—It was a practice in Buffalo in sales of grain, on an agreement for the purchase, to discharge the grain from an elevator into seller's own boat, thereby ascer-

taining the quantity, and then to deliver a B. L. to the purchaser, showing a shipment for his account, but with a stipulation that the wheat should remain the property of the seller until paid for. Nothing would be said as to the use of the bill lading.

If the purchaser realized by an advance by a consignee, to whose care he directed it and paid for it, it was all right; but if he went off without paying for it, the seller would claim it against the consignee to whose care it was directed, and who had advanced on it in good faith.

This was what was done in the cases in Dows *v* Perrin, 16 N. Y., 328; Dows *v.* Greene, 16 Barb., 72; Dows *v.* Rush, 28 Barb., 157; Dows *v.* Greene, 24 N. Y., 638.

The claim of the seller was maintained with surpassing ability, under the advice and by argument of Nicholas Hill. The turning point in favor of the claim by the consignee was upon the argument of Greene C. Bronson in Dows *v.* Rush, in 28 Barb., 157, which was followed by Dows. *v.* Greene, 24 N. Y., 638.

The next scheme got up, under advice of counsel, was to hold the wheat by a condition precedent. The wheat was discharged on purchaser's boat, on an order to the elevator to deliver, subject to seller's order until paid for. If the purchaser realized by an advance on bill lading, and paid for the wheat, that was satisfactory; but if he realized and run off with the money then the seller claimed the wheat on the assertion of the legal title.

This was the case of Rawle *v.* Deshler above cited, in which there was some evidence, as stated in the report of the case, that it was expected that the purchaser would raise the money on the bill lading.

The Judge who delivered the opinion of the Court of Appeals in Rawle *v.* Deshler, was one of the Judges

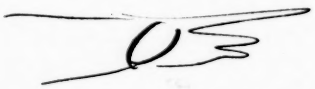
who heard the argument of Judge Bronson in Dows *v.* Rush, in the Supreme Court, and was impressed by his enforcement of the fraudulent element involved in surrrounding a sale with forms intended to overreach the title of a *bona fide* purchaser or consignee from a vendee, when it was expected that such vendee would use the grain to raise money to pay for it.

In this case of the Bank of Milwaukee, there can be no question that any intelligent merchant experienced in business, would conclude that the sale and transmission proceeded upon the responsibility of the Watertown Bank as security for the acceptance of A. F. Smith & Co., and that that Bank was willing to assume the position without any real intention or expectation under the circumstances of the object in view, in the purchase and transmission through the Watertown Bank, that this wheat would be held until the drafts matured without being disposed of for the purpose of raising money to pay the acceptances: these forms to the contrary notwithstanding.

These transactions of A. F. Smith & Co. were not single; but they were in a course of business in dealing in wheat to such an extent that it was irrational to suppose that A. F. Smith & Co. could or was expected to pay for the wheat without the use of it to realize the money as he was doing when obliged to suspend.

The plaintiff, as a party to a combination fraudulent as to third parties, dealing with A. F. Smith & Co., as *bona fide* purchasers, of which the intent was, if the latter failed to apply the proceeds of the wheat to the payment of the drafts, to overreach the title as to such third parties, after a sale by Smith & Co., as was contemplated, is not an innocent party. At least as to such third parties, the thief, supposed to be in the case by plaintiff's counsel in his argument, was at Milwaukee.

And in view of the real transactions between A. F. Smith & Co. and McLaren & Co., the latter, whose boasted facilities to do time-paper with the plaintiff was the inducement, is the culpable party, and what A. F. Smith did was no fraud upon them.



TENTH.—The exceptions taken to the exclusion of the evidence offered, as above stated, from the deposition of David Mannering, are well taken.

Bank of Washington *v.* Triplet, 1 Peters, 25.
Bayliff *v.* Butterworth, 1 Exch. 425, 428.
Pollock *v.* Stables, 17 Law, J. N. S., 352.
Merchants Bank *v.* State Bank, 10 Wall, 604.

ELEVENTH.—As to the damages, the plaintiff put in evidence the gross amount or rate sales in New York of the parcels of wheat claimed, without any deduction for freight paid or charges, on p. 148.

Cargo "Four Sisters," at $1.33 a bushel; cargo "Anna Rebecca" at $1.37 a bushel; "B. Hagaman" at $1.31; "George Ames" at $1.34.

The defendant offered to prove amount of freight and charges, the plaintiff objected, and Judge excluded the evidence, on p. 160.

Defendants asked the Judge to charge the jury that the allowance of interest upon their value, was a matter in their discretion. The Judge charged to the contrary, and defendant excepted. See statement of requests, ruling and exception, on p. 170.

The plaintiff claimed to recover full value at gross rate sale of each parcel on the canal boats, not exceed-

amount draft held against the cargo from which it

Ninth. (*a*).—The effect of the documentary evidence relied on by the plaintiff, depending on collateral facts in pais and extrinsic circumstances, the inferences of facts to be drawn from them were for the jury.

Etting *v.* Bank of the U. S., 11 Whar., 59.
Richardson *v.* Boston, 19 How., 263.
Railroad *v.* Stout, 17 Wall, 657.
Brown *v.* McGrau, 14 Pet., 479.
Barreda *v.* Silsbee, 21 How., 147.

cel (15th request) on p. 166.

Defendants further requested Judge to charge that the amount due in respect to any particular cargo should be pro rated (16th request, on p. 165).

The proportion of this lot from "Kate Kelly" on boat "Four Sisters" was less than one-fourth of the whole cargo.

The Judge charged that, as to any parcel from a lake vessel, of which the full value was less than amount draft unpaid against the whole cargo, plaintiff was entitled to recover such full value. (Foot of p. 169, *et seq.*

Defendants excepted to the Judge not charging this request (on p. 170).

It is submitted that each of the above exceptions is well taken.

C. VAN SANTVOORD,
Of Counsel for Def'ts.

Baylis *v.* [illegible]
Pollock *v.* Stables, 17 Law, J. N. S., [illegible].
Merchants Bank *v.* State Bank, 10 Wall, 604.

ELEVENTH.—As to the damages, the plaintiff put in evidence the gross amount or rate sales in New York of the parcels of wheat claimed, without any deduction for freight paid or charges, on p. 148.

Cargo "Four Sisters," at $1.33 a bushel; cargo "Anna Rebecca" at $1.37 a bushel; "B. Hagaman" at $1.31; "George Ames" at $1.34.

The defendant offered to prove amount of freight and charges, the plaintiff objected, and Judge excluded the evidence, on p. 160.

Defendants asked the Judge to charge the jury that the allowance of interest upon their value, was a matter in their discretion. The Judge charged to the contrary, and defendant excepted. See statement of requests, ruling and exception, on p. 170.

The plaintiff claimed to recover full value at gross rate sale of each parcel on the canal boats, not exceed-

ing amount draft held against the cargo from which it came, without accounting for the residue of the cargo.

For instance, it held an unpaid draft for $7,500 against the cargo of "Kate Kelly," which amounted to 16,254$\frac{3}{6}\frac{6}{0}$ bushels of wheat, of which 3,047$\frac{1}{6}\frac{0}{0}$ bushels wheat went on board the canal boat "Four Sisters," and for which the defendants realized (gross without deduction of any freight or charges), at $1.33, $4,052.73.

See the claim on p. 166.

The residue of the cargo of "Kate Kelly," 11,207$\frac{1}{6}$, at same rate of valuation, would be $14,905.31.

Defendants asked the Judge to charge as to damages that the claim of the plaintiffs, if entitled to any recovery, would be limited to their interest for unpaid drafts, not exceeding the value of any particular parcel (15th request) on p. 165.

Defendants further requested Judge to charge that the amount due in respect to any particular cargo should be pro rated (16th request, on p. 165).

The proportion of this lot from "Kate Kelly" on boat "Four Sisters" was less than one-fourth of the whole cargo.

The Judge charged that, as to any parcel from a lake vessel, of which the full value was less than amount draft unpaid against the whole cargo, plaintiff was entitled to recover such full value. (Foot of p. 169, *et seq.*

Defendants excepted to the Judge not charging this request (on p. 170).

It is submitted that each of the above exceptions is well taken.

C. VAN SANTVOORD,
Of Counsel for Def'ts.

UNITED STATES
SUPREME COURT.

No. 364.

DAVID DOWS, JOHN DOWS MAIRS and
ALEXANDER ECTOR ORR,
Plaintiffs in Error,

vs.

THE NATIONAL EXCHANGE BANK OF
MILWAUKEE,
Defendant in Error.

BRIEF.

H. M. FINCH,
Of Counsel for
Milwaukee, Wis. DEFENDANT IN ERROR.

Lawrence Miller, Law and Commercial Printer, 116 Michigan St.

SUPREME COURT

OF THE

UNITED STATES.

DAVID DOWS, JOHN DOWS MAIRS and ALEXANDER ECTOR ORR,

Plaintiffs in Error.

vs.

THE NATIONAL EXCHANGE BANK OF MILWAUKEE.

Defendant in Error.

STATEMENT OF THE CASE.

This was an action of trover, instituted by the National Exchange Bank of Milwaukee, in the Circuit Court of the United States, in and for the Southern District of New York, to recover damages for the alleged conversion, by Messrs. David Dows and Co., of twenty-two thousand three hundred and forty-one bushels of wheat, which the bank claimed as its property.

The cause was tried before the Hon. L. B. Woodruff, Circuit Judge, and resulted in a verdict in favor of the bank for thirty-one thousand one hundred and eleven dollars and fifty-one cents.

The wheat in question was purchased in Milwaukee, Wisconsin, by Wm. P. McLaren & Co., in the month of September, 1869, upon orders received from A. F. Smith & Co., of Oswego, New York. McLaren & Co. paid for the wheat so purchased; and to re-imburse themselves for the money advanced by them on the purchase, they shipped the wheat on three lake vessels, named respectively, *Kate Kelly*, *Grenada*, and *Corsican*, and received from the captains of said vessels, triplicate bills of lading (copy of the bill of lading of the Grenada is on page 8 of the printed case; of the Kate Kelly on page 12; and of the Corsican on pages 15 and 16.) The bills of lading describe Wm. P. McLaren & Co. as the shipper, and by their terms make the wheat deliverable to the *account of W. G. Fitch, Cashier, care Merchant's Bank, Watertown, New York.* McLaren & Co. presented drafts drawn on A. F. Smith & Co., with the original bills of lading attached thereto, to the National Exchange Bank of Milwaukee for discount. The drafts were discounted by the bank, and the proceeds placed to the credit of Wm. P. McLaren & Co. The bank retained the drafts and original bills of lading. The quantity of wheat thus purchased by McLaren & Co., and shipped, and the amount of the drafts drawn on A. F. Smith & Co. and discounted by the bank is as follows:

Kate Kelly, 14,254 20-60 bushels No. 1 wheat.

Sight draft, dated Sept. 2nd, 1869, . . .	$4,080.81
Time draft at 30 days, " " . . .	7,500.00
" " 45 " " " . . .	7,500.00

Grenada—14,500 bushels No. 1 wheat, Sight draft, dated September 13th, 1869, ... $1,232.24

Time draft at 30 days, " "	8,000.00
" " at 45 days, " "	8,000.00

Corsican—13,400 bushels No. 1 wheat, sight draft, dated Sept. 27th, 1869, ... $3,423.93

Time draft, at 30 days, Sept. 27th, 1869, . .	6,600.00
" " " 45 " " "	6,600.00

The cashier of the Milwaukee Bank, after discounting the drafts, wrote a special endorsement on the back of each bill of lading. The endorsement on the back of the bill of lading of the Grenada reads as follows: "*On payment* of two drafts drawn by Wm. P. McLaren & Co. on A. F. Smith & Co., Oswego, N. Y., to my order, and dated Sept. 13th,

1869, one draft at 30 days date for $8,000, and the other at 45 days date for $8,000, both drafts being payable at the Merchant's Bank, Watertown, N. Y., you will surrender the within mentioned wheat to A, F. Smith & Co. or order. Should drafts above mentioned not be promptly paid *hold the wheat* for my account, without recourse.

W. G. FITCH, Cashier,
Merchant's Bank, Watertown, N. Y.

Milwaukee, 13th Sept. 1869."

An endorsement in the same language, except the amounts and dates of the drafts, was made on the bills of lading of the Kate Kelly and the Corsican.

McLaren & Co. insured the cargoes for their account from Milwaukee to Oswego, and transferred the insurance certificates to the bank.

After making the endorsements on the bills of lading the cashier of the bank enclosed the drafts, bills of lading, and certificates of insurance, in letters addressed to the Merchant's Bank, Watertown, N. Y.

The letter enclosing the drafts, bill of lading and certificates of insurance of the cargo of the Kate Kelly can be found on page 13 of the printed case, and is as follows:

September 2.

To Cashier Merchant's Bank,
Watertown, N. Y.:

I hand you for collection and remittance to Mercantile National Bank, New York, for my credit:

W. P. McLaren & Co., on A. F. Smith & Co.,

Oswego,	. . . . .		$4,080.81 exg.
"	"	October 5,	7,500.00 "
"	"	October 20,	7,500.00 "

B. L. schr. Kate Kelly, 8,727 bushels Amber Mil. wheat.
" " 5,527.20 bushels No. 1, Amber Mil. wheat, consigned to your bank for my account, *and to be held by you subject to the payment of the above drafts.*

Insured Northwestern Nat. Ins. Co., . . .	$5,000.00
Nat Ins. Co. Boston, ...	5,000.00
Ætna Ins. Co. Hartford, ...	5,000.00
Republic Ins. Co., ...	5,000.00
Security Ins. Co., ...	4,000.00

I consign this wheat to you to be held as per endorsed B. L. and surrender *only on payment* of the drafts drawn

against it, holding you responsible for the same in case of non-payment of the drafts. Will you receive consignments in this way, charging reasonably for the same?

Yours truly,
W. G. FITCH,
Cashier.

On the 6th of September, 1869, J. F. Moffitt, cashier of the Merchant's Bank, replied, acknowledging the receipt of the letter and its enclosures.—(page 14.)

On the 8th of September, 1869, Fitch addressed another letter, as follows:

"September 8, 1869.

"To Merchants Bank of Watertown, N. Y.:

"In my letter of the 2d, I requested you to state in your letter whether you would HOLD all wheat I consign to you strictly for my ac., holding your bank responsible for the safe-keeping of the property for this bank, and holding such property subject to my orders in all cases where the drafts made against it are not paid. Your reply of the 6th inst. does not answer my inquiry. Will you please write me by return mail defining your position? We have adopted the invariable rule to, in no instance, consign property only on condition that the consignee acknowledges himself responsible for it, until instructed to hand over to a third party.

Very Respectfully,
W. G. FITCH,
Cashier."

Sept. 11th, 1869, Moffit, Cashier of the Merchant's Bank, wrote a letter to Fitch, in which he says: "In reply to yours of the 2nd inst., I would say that we will receive, until further notice, such consignments as you choose to send us, holding us responsible for the grain in case of non-payments of drafts, and shall charge $\frac{3}{8}$ per cent. commissions for so doing." (page 18.) And on the 13th Sept. 1869, he acknowledged the receipt of the letter of Fitch, of the date of 8th Sept., and says: "I believe your inquiry was answered in mine of the 11th inst." (page 18.)

Letters, in substantially the same language as that of the one dated Sept. 2nd, were written to the Cashier of the Merchant's Bank, enclosing the bills of lading, drafts and certificates of insurance of the cargoes of the Grenada and Corsican.

The letter in relation to the cargo of the Grenada, is dated September 13th, 1869, and is found on pages 9 and 10 of the printed case, and was received September 16th, 1869, (page 10.) The letter in relation to the cargo of the Corsican, is dated September 28th, 1869, and is found on pages 16 and 17, and was received by the Merchant's Bank October 1st 1869.

Wm. P. McLaren testifies on page 26, as follows: "I have conversed with Mr. Fitch, the cashier, in reference to the necessity of all precaution being taken in connection with the shipments *to prevent the grain going into possession of A. F. Smith & Co. until the drafts were paid*, but never, to my recollection, discussed its going into any particular warehouse."

The Merchant's Bank is located at Watertown, N. Y., and is sixty miles or more distant from Oswego.

The Cashier of the Merchant's Bank, upon receipt of the drafts and bill of lading of the *Kate Kelly*, wrote three letters; one to A. F. Smith & Co., dated Watertown, N. Y., Sept. 6th, 1869, as follows: "Please find enclosed for acceptance and return the following, to-wit:

W. P. McLaren & Co., on your st. . . $4,080.81 and exg.
" " " October 5th, . . 7,500.00 "
" " " 20th, . . 7,500.00 "

also inspection certificate, (page 47.)

Another bearing the same date, as follows: (page 145.)

"Proprietors of Corn Exchange Elevator,
OSWEGO, NEW YORK:

"*Dear Sirs*:—Please find enclosed an order for cargo Schr. er Kate Kelly for 8,727 bushels Amber Milwaukee wheat, and 5,527 20-60 bushels No. 1 Amber Milwaukee wheat, to be delivered to you, and you will please hold the *same subject to, and deliver the grain only on payment* of the following drafts, to-wit:

W. P. McLaren & Co., on A. F. Smith & Co., st. . . . . $4,080.81 and exg.
" " October 5th, 7,500.00 " "
" " " 20th, 7,500.00 " "

And the third of the same date, as follows:

"MERCHANT'S BANK,
Watertown, N. Y., September 6th, 1869.

"ROBERT HAYES, ESQ.:

Master Schr. Kate Kelly, Oswego, N. Y.

"*Dear Sir:* Please deliver *to the Corn Exchange Elevator*, Oswego, New York, your cargo, 8,727 bushels of Amber Milwaukee wheat, and 5,527 30-60 bushels of No. 1 Amber Milwaukee wheat, consigned to us by W. G. Fitch, Esq., Cashier," (page 48.)

A form of the inspection certificate mentioned in the first letter is found on page 48.

The letters relating to the cargo of the *Grenada*, all bear date Watertown, Sept. 16, 1869, and will be found on pages 49 and 50, 145 and 56, and are as follows:

"A. F. SMITH & Co., OSWEGO, N. Y.

"*Dear Sir:* I enclose herewith, for acceptance and return, the following drafts, to-wit:

W. P. McLaren & Co., on your st., . . $1,232.24 and exg.
" " October 16, . . 8,000.00 " "
" " " 31, . . 8,000.00 " "

also inspector's certificate.

Yours Respectfully,
J. F. MOFFITT, Cashier."

"PROPRIETORS CORN EXCHANGE ELEVATOR,
OSWEGO, NEW YORK:

Dear Sirs: Please find enclosed an order to deliver to you 14,500 bushels of No. 1 Amber Milwaukee wheat. This grain, *you are to hold subject to, and delivered only on payment* of the following drafts, to-wit:

W. P. McLaren & Co., on A. F. Smith & Co. st, ... $1,232.24 and exg.
" " " October 16, 8,000.00 " "
" " " " 31, 8,000.00 " "

Yours, Very Respectfully,
J. F. MOFFITT, Cashier.

A. D. MCINTYRE, ESQ.,
Master Schooner Grenada, Oswego, New York.

"*Dear Sir:* You may deliver your cargo of 14,500 bushels No. 1 Amber Milwaukee wheat, to the *Corn Exchange Elevator*, of Oswego, N. Y., *for account of W. G. Fitch, Cashier, and subject to order of this bank.*

Yours, Respectfully,
J. F. MOFFITT."

The letters relating to the cargo of the *Corsican*, all bear date, Watertown, October 1st, 1869, and will be found on pages 50, 145 and 45, and are as follows:

"A. F. SMITH & Co.,

OSWEGO, NEW YORK:

"*Dear Sir:* I enclose for acceptance and return the following drafts, to-wit:

W. P. McLaren & Co.,	on you,	sight,	$3,432.93	and exg.
" " "		October 30,	6.600.00	" "
" " "		Nov. 14,	6,600.00	" "

also inspector's certificate.

Yours, Respectfully,

J. T. MOFFITT, Cashier."

"A. F. SMITH & Co.,

Proprietors Corn Exchange Elevator, Oswego, N. Y.

"*Dear Sirs:* I enclose herewith an order to deliver to you the cargo of schooner Corsican, of 13,400 bushels, No. 1 Amber Milwaukee wheat, consigned to us by W. G. Fitch. Cash., *with instructions to hold the same until the following drafts are paid:*

W. P. McLaren & Co., on A. F. Smith & Co. st., ...		$3,422.93	and exg.
" " "	October 30,	6.600.00	" "
" " "	Nov. 14,	6.600.00	" "

Please hold for account accordingly.

Yours truly,

J. F. MOFFITT,

Cashier."

MASTER SCHOONER CORSICAN,

OSWEGO, NEW YORK,

Dear Sir: Please deliver to *the Corn Exchange Elevator* of Oswego, N. Y., your cargo of 13,400 bushels of No. 1 Amber Milwaukee wheat, *for account of W. G. Fitch, Cashier, and subject to our order.*

Yours Respectfully,

J. F. MOFFITT,

Cashier.

All of these letters were sent by mail, on their respective dates, to A. F. Smith & Co., Oswego, New York, and were received by them by due course of mail.

A. F. Smith & Co., on the receipt of the letters, paid each

of the sight drafts, and returned the time drafts, accepted, to the Merchant's Bank without objection, and *without expressing any dissent to the terms and conditions upon which the wheat was to be delivered on its arrival, to the Corn Exchange Elevator.* The sight drafts were paid, and the time drafts accepted several days before the arrival of the cargoes at Oswego.

McLaren & Co. forwarded to A. F. Smith & Co. invoices of the purchases, with statement of account for disbursements and commissions. The invoice of the *Kate Kelly* will be found on page 24, and is headed as follows: "Account purchase of 14,250 20-60 bushels wheat, bought for account, and by order of A. F. Smith & Co., Oswego, N. Y., through W. P. McLaren & Co." The invoice of the *Grenada* is headed the same except as to the number of bushels of wheat, and is printed on pages 25 and 26.

The invoice of the schooner *Corsican* is also headed the same, except the number of bushels, and is printed on pages 26 and 27.

The invoice of the *Kate Kelly* was inclosed in a letter of Wm. P. McLaren & Co., to A. F. Smith & Co., dated Milwaukee, Sept. 2nd, 1869, (page 96.)

The invoice of the *Grenada* was inclosed in a letter of Wm. P. McLaren & Co., to A. F. Smith & Co., dated Milwaukee, Sept. 11th, 1869. (page 101.)

The invoice of the *Corsican* was inclosed in a letter of Wm. P. McLaren & Co., to A. F. Smith & Co. dated Milwaukee, Sept. 27th, 1869. (page 106.)

The correspondence between Wm. P. McLaren & Co. and A. F. Smith & Co., will be found on pages 92 to 107 inclusive.

The duplicate and triplicate bills of lading were retained by McLaren & Co. *No bill of lading of either cargo was ever sent to A. F. Smith & Co.*

The officers of the National Exchange Bank of Milwaukee never saw the invoices, or the correspondence between McLaren & Co. and A. F. Smith & Co.

It appears, from the evidence, that McLaren & Co. previous to the transaction in question, had purchased wheat in Milwaukee for A. F. Smith & Co. The arrangements for making purchases for A. F. Smith & Co. was made by one

Farwell, acting as their agent. McLaren testifies, (page 36) as follows: "We frequently received orders from Mr. Farwell, while in Milwaukee, to buy and ship grain for A. F. Smith & Co., and acted on his instructions in regard to the buying, shipping and drawing for the same; we, at different times, discussed the arrangements of drawing time paper, and when Mr. Farwell desired to designate the banks East through whom such drafts should be sent, we agreed to send them, and consign the property to any good responsible bank Smith & Co. might designate, always stipulating that we should adhere to our positive business rules in such cases, and on no account consent to any property so shipped to pass out of the control of the banks, in whose care it had been placed, until all drafts made against it had been paid." (A. F. Smith & Co. claim that Farwell was not authorized by them to make any such arrangement, but do not deny his agency.) (page 76.)

It was in pursuance of this arrangement that the Merchant's Bank at Watertown was selected to take charge of these cargoes, and to hold the same until payment of the drafts.

The *Kate Kelly* arrived in Oswego with her cargo Sept. 16th, 1869. The cargo was discharged into the Corn Exchange Elevator. 7,300 bushels were "spouted" direct from the vessel through the elevator, into the canal boat *Frank Alvord*, and other quantities into the South, Middle and North team bins; the balance of the cargo went into numbered bins; and 3,047 10-60 bushels was, on the 18th Sept., shipped into the canal boat *Four Sisters*, and a bill of lading, dated Sept. 18th, 1869, signed by G. A. Bennett, was delivered to A. F. Smith & Co. The canal boat arrived in New York, Oct. 9th, 1869. A. F. Smith & Co. paid the time draft of $7,500, drawn at 30 days. The time draft of $7,500 drawn at 45 days was unpaid at the date of this shipment.

The *Grenada* arrived in Oswego with her cargo, on the 24th day of Sept. 1869. 2,000 bushels were "spouted" into the boat *Caribean*, and on the 27th Sept., 1869, 7,100 bushels were shipped into the canal boat *B. Hagaman*, by A. F. Smith & Co., and a bill of lading of that date, signed by G. A. Bennett, was delivered to them. This canal boat

arrived in New York Oct. 27th, 1869. The two time drafts, drawn on the cargo of the Grenada were unpaid at the date of this shipment.

The *Corsican* arrived in Oswego, with her cargo, on the 8th Oct. 1869, and on the same day A. F. Smith & Co. shipped 4,358 bushels of it into the canal boat *Anna Rebecca*, and 7,836 bushels of it into the canal boat *George Ames*, and received bills of lading therefor. These canal boats arrived in New York on the 4th Nov. 1869. The time drafts drawn on the cargo of the Corsican were not paid at the time of these shipments.

The captains of the Kate Kelly, Grenada and Corsican, on their arrival at Oswego, called at the office of the Corn Exchange Elevator, and there found and received from A. F. Smith & Co., before delivering their cargoes, the orders which had been sent for them, in the letters written by the cashier of the Merchant's Bank to the proprietors of the Corn Exchange Elevator. A. F. Smith & Co. were the proprietors of the Corn Exchange Elevator. They paid the freight on the cargoes and receipted therefor, on the back of the bills of lading retained by the captains. The form of the receipts is shown on pages 55 and 60.

The shipments by A. F. Smith & Co. were made without the knowledge or consent of the officers of the Merchant's Bank.

The "Corn Exchange Elevator" is a warehouse situated on the Oswego river. It has storage capacity for about 250,000 bushels. It is fitted up with bins; all of the bins, except three, are of the same size, and are numbered. The three bins, not numbered, are called the north, middle and south team bins. There are fifty-one bins in the warehouse, —and they will each hold between 4,200 and 4,500 bushels. The warehouse is fitted up with all the necessary machinery for loading and unloading cargoes. It was the custom to keep separate the cargoes received into the elevator.

There was no mixture in the Elevator of any of the cargoes of the Kate Kelly, Grenada or Corsican.

A. F. Smith & Co. on receiving the canal boat bills of lading, sent the same, with Sight drafts attached, through banks in New York City, to Messrs. Dows & Co. The following is a statement of the amounts and dates of the drafts drawn against each cargo:

The Four Sisters—$9,546, dated Sept. 18th, 1869.
B. Hagaman—$8,733, dated Sept. 27th, 1869.
Anna Rebecca—$7,700, dated Oct. 8th, 1869.
George Ames—$6,284.52, dated Oct. 8th, 1869.

The draft on the cargo of the Four Sisters was paid on the 20th September, 1869, and the bill of lading delivered to Messrs. Dows & Co.

The draft on the cargo of the B. Hagaman was paid Sept. 29th, 1869, and the bill of lading delivered to Messrs. Dows & Co.

The drafts on the cargoes of the Anna Rebecca and the George Ames were paid Oct. 11th, 1869, and the bills of lading delivered to Messrs. Dows & Co.

All of the time drafts drawn by W. P. McLaren & Co. on A. F. Smith & Co. (except the thirty day draft on the cargo of the Kate Kelly,) being unpaid, were, with the original bills of lading and certificates of insurance, returned to the Milwaukee Bank. The bills of lading remained in the custody and possession of the Merchant's Bank until they were returned.

The Milwaukee Bank was advised, in the latter part of October, that its wheat had been shipped by A. F. Smith & Co., and Wm. P. McLaren went to Oswego to look after the grain. He was in Oswego from about the 20th to the 25th of October, and on examination found *no wheat in the elevator*. Having ascertained, on the 22d October, that portions of the cargoes had been shipped to Messrs. Dows & Co., a telegram was sent to them on that day, notifying them that the wheat shipped on the canal boats *Four Sisters*, *B. Hagaman*, *George Ames* and *Anna Rebecca*, was the property of the National Exchange Bank of Milwaukee. That telegram was received by Messrs. Dows & Co. on the day on which it was sent. (copy of the telegram will be found at the foot of page 146 of the printed case.)

The day following the sending of this telegram, parties interested in the wheat called on Messrs. Dows & Co., and in that interview they agreed that if no attempt was made to stop the wheat on the canal, it should, on its arrival in New York, be kept separate; that the Milwaukee Bank shonld be notified of its arrival, and they, (Dows & Co.) would identify it as the wheat coming out of the said canal boats, and

would only require proof of the identity of the wheat into the canal boats at Oswego.

On the arrival of the wheat, Messrs. Dows & Co. gave notice to the Milwaukee Bank. A formal demand, in writing, was made for the wheat. (page 147.) Messrs. Dows & Co. refused to deliver the same unless they were paid the amount of their advances to A. F. Smith & Co., and the freight which they had paid on the cargoes from Oswego to New York, and unless the Milwaukee Bank would take care of an order given by A. F. Smith & Co. to Norris Winslow on Messrs. Dows, for any margins in their hands due A. F. Smith & Co.

The bill of exceptions contains a mass of testimony and correspondence, (much of which seems to be unnecessary to fairly present the points,) some of which is twice repeated, and does not upon its face, show that all of the material testimony or the substantial portions thereof, is given.

ARGUMENT.

This is one of those unfortunate cases in which the fraud or felony of a third person brings a loss upon innocent parties, and the real question is, on which must the loss fall? It must be conceded that the Milwaukee Bank took every possible precaution to protect its title to this wheat. It not only wrote special endorsements on the back of each bill of lading, but repeated the substance of the endorsement in its letter of instruction to the Merchant's Bank. It could do nothing more to protect its title. By the fraud or felony of A. F. Smith & Co. the wheat was removed from the elevator into canal boats and so shipped that Messrs. Dows & Co. trusting only to the bills of lading which recited that A. F. Smith & Co. were the shippers were induced to advance the large sums of money they did. It must be conceded that these bills of lading were obtained without the knowledge or consent of the Milwaukee Bank or its agent, the Merchant's Bank; and it must be further conceded that no authority, express or implied, real or apparent, was given by the Milwaukee Bank to the Merchant's Bank, or to A. F. Smith & Co., to sell, ship, or otherwise dispose of the wheat, or to obtain the canal boat bills of lading.

The Messrs. Dows & Co. trusted and relied upon bills of lading obtained by one having no right or authority from the true owner of the wheat, and they attempt to invoke for their defence the principle that "whenever one of two innocent persons must suffer by the acts of a third, he who has enabled the third person to occasion the loss must sustain it." The difficulty is not in the correctness of the principle they invoke, but in its application to the facts of this case. The principle is well established, and, when properly applicable, is intended to protect persons who otherwise might be defrauded, and is not to be so applied as to facilitate fraud. The rule of the common law, as to the purchase of chattels, is *caveat emptor*. Mere possession of chattels is not, of itself, conclusive evidence of title; hence a third person purchasing chattels from one who has simply possession, is bound to know the exact condition of the title. In the langauge of WOODRUFF, J., in *Spraight's vs. Hawley*, 39th N. Y., page 446: "Chattels are not negotiable. Possession is not, as in the case of negotiable paper and money, assurance of title or of authority to dispose of. The servant entrusted with the possession of his master's property does not thereby give authority to sell it, or to authorize another to sell it. The borrower of a chattel or the ordinary bailee does not by his possession gain any such power. And, in short, the rule that no one can be deprived of his title without his own consent has no such exception as is sought to be created in this case." And on page 448 the learned judge thus replies to the attempt made in that case to enforce the application of the principle invoked by the Messrs. Dows & Co. in this case: "How did the *mere possession* of the mortgagors enable them to commit the wrong? Only by giving them physical power to deliver the property. The maxim is not true in the sense in which it is sought to be here applied. If it were, then, as in the other cases above referred to, whenever an owner suffers his property to go out of his manual keeping or presence he is liable to lose it by the same means employed here and is exposed to the maxim here invoked for the defendant's protection. It is only when the owner has parted with the legal title upon some secret trust or condition, or has done something calculated to mislead, upon which a third person has a right to rely, and on

which he does rely, that such maxim could have any application—and the attempt to apply it here begs the whole question. Mere possession of another's property is not such evidence of ownership, or authority to sell, that third persons have a right, as against the true owner, to rely thereon."

We have made these quotations from the opinion of the learned Judge, because they express, in clear and exact terms, the law applicable to the purchase of chattels from one who has simply the possession of the same from the owner, clothed with no power of sale, and having no *indicia* of title. The case in which the opinion was delivered was one of peculiar hardship; jewels had been left by a mortgagee in the possession of a mortgagor. The mortgagor deposited them with a jeweller for sale; the jeweller sold the jewels and received the money therefor, and paid it to the mortgagor; he received nothing for his services in making the sale. The mortgagee brought suit against the jeweller for their conversion, and recovered their full value.

In *Ruckman vs. Decker* 23d N. J. Equity Reports, page 288 is this language: "The legal owner of any chattel cannot be deprived of his property by a sale not authorized by him although the purchaser acted in entire good faith, *and the vendor was in possession of the property seemingly as if his own.* An agistor of cattle, or a livery stable keeper cannot give good title to cattle or horses left with him; nor would a sale by a jeweller of a diamond necklace left by a customer for repair pass the title though the purchaser bought and paid for it in good faith while exhibited in the show case with the jewelry of the vendor."

It is now well settled law, that the owner of chattels or goods, has, as a general rule, a legal right to entrust the possession of them with whom he pleases, for special purposes, or upon special conditions; and because he does so, it will not aid a vendee in his title, who purchases, in good faith, for a valuable consideration, and without notice of the rights of the true owner, to assert that he was ignorant of any want of title in his vendor, and that he relied upon apparent ownership, created by mere possession, nor will such vendee be permitted, under such circumstances, to invoke, in his behalf, the principle that where "one of two innocent persons must suffer by the act of a third, he, who has

enabled the third person to occasion the loss must sustain it." The vendee is bound to know the extent and character of the possession of the vendor. To apply this principle in favor of such a vendee, as against the true owner of the property, would be to pervert a salutary principle, and make it work a fraud upon the true owner. It is easy to see that if the owner of personal property was to lose his title to it, under such circumstances, there would be an end to all special bailments. With a rule of law, that would divest a true owner of personal property, of his title thereto, by merely leaving the same in the possession of a third party, no owner would dare to entrust a third party with its custody for any purpose. Jewels could not be left with jewelers for repair; or a horse with a blacksmith to be shod; or hides with a tanner, to be manufactured into leather; or wheat with a miller to be ground into flour; or merchandize in the hands of a carrier for transportation; or grain deposited with a warehouseman for storage. The necessities of trade and commerce demand that the owner of goods and chattels shall be allowed to place them in the possession of third parties for special purposes, and when he does so, he is not to be charged with their loss, if a party, acting innocently, and in good faith, has paid out his money, relying only upon the possession of that third party for title. The possession of the goods or chattels, although *prima facie* evidence of the ownership, is not such proof of it. as to confer any equities upon third parties against the actual owner's title.

We think a careful examination of the facts in this case will show that Messrs. Dows & Co. in making advances to A. F. Smith & Co. upon the canal boat bills of lading, covering the wheat in question, had simply the fact that A. F. Smith & Co., as proprietors of the Corn Exchange Elevator, had only the manual possession of the wheat to rely upon, as evidence of their title to it. It is certain that A. F. Smith & Co. held no paper from the Milwaukee Bank or its special agent, the Merchant's Bank, and upon the faith of which Messrs. Dows & Co. made their advances, that can be claimed as "documentary evidence of title," and it is equally clear, that no authority, express or implied, was given by the Milwaukee Bank, or its agent, to A. F. Smith & Co., to deliver to Messrs. Dows & Co. the canal boat bills of lading;

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It is now well settled law, that the owner of chattels or goods, has, as a general rule, a legal right to entrust the possession of them with whom he pleases, for special purposes, or upon special conditions; and because he does so, it will not aid a vendee in his title, who purchases, in good faith, for a valuable consideration, and without notice of the rights of the true owner, to assert that he was ignorant of any want of title in his vendor, and that he relied upon ap parent ownership, created by mere possession, nor will such vendee be permitted, under such circumstances, to invoke, in his behalf, the principle that where "one of two innocent persons must suffer by the act of a third, he, who has

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We think a careful examination of the facts in this case will show that Messrs. Dows & Co. in making advances to A. F. Smith & Co. upon the canal boat bills of lading, covering the wheat in question, had simply the fact that A. F. Smith & Co., as proprietors of the Corn Exchange Elevator, had only the manual possession of the wheat to rely upon, as evidence of their title to it. It is certain that A. F. Smith & Co. held no paper from the Milwaukee Bank or its special agent, the Merchant's Bank, and upon the faith of which Messrs. Dows & Co. made their advances, that can be claimed as "documentary evidence of title," and it is equally clear, that no authority, express or implied, was given by the Milwaukee Bank, or its agent, to A. F. Smith & Co., to deliver to Messrs. Dows & Co. the canal boat bills of lading;

and it is also equally clear that A. F. Smith & Co. were neither factors or agents of the Milwaukee Bank, and were clothed with no authority of any kind to sell, ship or dispose of the wheat in question; *they held the wheat simply for storage*, and had no other or different control of it than any warehouseman who receives and holds property for storage.

The important question to be determined in this cause is which of the parties before the court has *the title* to the wheat. In the solution of this question, both parties claiming to be equally innocent, the rules of law are to be strictly applied;—there are no "equities" to be adjusted between the innocent parties; the one fortunate enough to hold *the legal title* must prevail. In order to determine which of these innocent parties has the legal title to the wheat in question, we assert the following propositions of law.

1*st*. The National Exchange Bank of Milwaukee, by virtue of the transactions between itself and Wm. P. McLaren & Co. became vested with the legal title to the wheat shipped on the schooners Kate Kelly, Grenada and Corsican.

2*nd*. That the Merchants' Bank, at Watertown, was appointed a special agent for a special purpose, and clothed only with the limited power to hold the wheat covered by the bills of lading, signed by the captains of the vessels before mentioned, until payment of the drafts accompanying them, and upon such payment, to deliver the wheat to A. F. Smith & Co.

3*d*. That the Merchant's Bank had a legal right to select the warehouse, known as the Corn Exchange Elevator, to store the cargoes, until the drafts were paid.

4*th*. That the letters of the Merchant's Bank to A. F. Smith & Co., and the orders enclosed in said letters addressed to the captains of said vessels, were clearly directions to store the wheat in the Corn Exchange Elevator, for the account of W. G. Fitch, cashier, subject to the order of the Merchant's Bank, until payment of the drafts, and that A. F. Smith & Co. in paying the sight drafts, accepting the time drafts, and receiving the wheat, with full knowledge that the same was to be so held, had possession of it simply and only as warehouse men, and in no other capacity.

5th. That the act of A. F. Smith & Co., in shipping the wheat into the canal boats, was without authority from the Milwaukee Bank or its agent, was a tortious act, was a fraud on McLaren & Co., and on the National Exchange Bank of Milwaukee.

6th. That Messrs. Dows & Co., receiving said wheat from A. F. Smith & Co., acquired no title thereto as against the National Exchange Bank of Milwaukee.

7th. That the Milwaukee Bank, in order to recover the value of this wheat from Messrs. Dows & Co., was not obliged to tender or to pay the advances made by them to A. F. Smith & Co., or to pay the freight money from Oswego to New York.

8th. That the measure of damages in this action, is the value of the wheat received by Messrs. Dows & Co. with interest from the date of its conversion.

If these points, are successfully maintained, they necessarily lead to an affirmance of the judgment.

I.

Did the National Exchange Bank of Milwaukee acquire the title to the wheat shipped on board the schooners Kate Kelly, Grenada and Corsican by the transactions which took place between itself and the firm of Wm. P. McLaren & Co.?

McLaren & Co. were the original purchasers of the wheat. They purchased the wheat in the City of Milwaukee, and paid for it with their own money. It is true that the wheat was purchased on orders from A. F. Smith & Co., but no money was furnished by the latter firm to pay for the wheat. It is undoubtedly true that McLaren & Co. could have shipped the wheat directly to A. F. Smith & Co., and looked to them alone for the re-payment of the money advanced for its purchase; and it is equally true that McLaren & Co., as unpaid vendors, or as purchasing agents, had a legal right to retain and hold the wheat until all their advances were re-

paid. They elected to take the latter course, and accordingly shipped the wheat on the Kate Kelly, Grenada and Corsican—vessels chartered by themselves,—and received from the captains bills of lading reciting that they were the shippers, and making the wheat specified therein deliverable to "*W. G. Fitch, cashier, care of Merchant's Bank, Watertown, N. Y.*" A. F. Smith & Co. were not named in the bills of lading; and no bill of lading, or copy of one, of either cargo, was ever forwarded to them. McLaren & Co. delivered the original bills of lading to Fitch, the cashier, and at the same time transferred to Fitch the certificates of insurance upon the cargoes. Upon the faith of the bills of lading and the certificates of insurance, McLaren & Co. obtained a discount of the drafts attached thereto.

The withholding of the bills of lading, and the actual transfer of them to the bank, show a deliberate and conclusive intention on the part of McLaren & Co., not to deliver unconditionally the wheat in those vessels, and named in those bills of lading, to A. F. Smith & Co. The title to the wheat when it left Milwaukee, by the terms of the bills of lading, was in the Milwaukee Bank. A. F. Smith & Co., at this time, had no interest in the wheat. They had accepted no drafts, and paid no money on its account. The Milwaukee Bank, at this time, was the only party who held an insurable interest in the wheat. Having received the original bill of lading from the original purchaser of the wheat, in the usual course of business, and for a valuable consideration paid, the legal title to the wheat was perfect in the bank "as against all the world." It alone held the only "documentary evidence of title." That McLaren & Co., as unpaid vendors, or purchasing agents, had a legal right as against A. F. Smith & Co., to make the appropriation of these cargoes as they did is too well settled law to be successfully controverted.

In the case of the *Aurora 4th C. Robinson* 218, the facts were these: "Cunningham, a merchant in Belfast, Ireland, chartered a vessel, and sent her to the island of Tenneriffe to bring from thence a cargo for the account of Neale, a merchant in America. The vessel arrived at Tenneriffe where there was an agent of Cunningham, who purchased the cargo of Cullen & Co. of Seville. The shippers consented to let the cargo go to Belfast in the ship sent out by Cunningham,

but not to the hands of Cunningham in the first instance, nor for the account of Neale. It was described as going for their order, and consigned to the house of Boland & Co., in London, who were to suffer it to go on to Cunningham if they were satisfied for the payment. By this means the shippers calculated to protect themselves against dangers of two kinds. They were not personally acquainted with Cunningham; they hoped therefore to guarantee themselves against any risk from that quarter, and also against the insolvency of Neale. But in doing so, says Sir W. Scott, they unfortunately did not foresee that they rendered the property liable to condemnation as property still vested in them, subjects of a state in hostility with England—there being war at that time between England and Spain. "The shippers," says Sir W. Scott, delivering the opinion of the Court, "having the goods in their power and in their own port, refuse to let them go, unless under an alteration of the bill of lading. It is true the vessel was coming to Belfast, but are the goods consigned to Mr. Cunningham? By no means. *He has no legal connection whatever with them; he had no document by which he could demand possession or describe himself as the legal importer;* but the question is whether he can in law be so considered. Suppose the ship had arrived, and that Cunningham in the mean time had been involved in difficulties, would not Boland & Co. have stopped the goods? In what way could Cunningham have demanded them? They would have been still the goods of Cullen & Co., and in his own possession," (*yet they were on Cunningham's ship*); "for the possession of Boland & Co., his agents would be considered as his own. If I send money to a banker, my banker's possession is my possession. To say that Boland & Co. are the agents and correspondents of Cunningham makes no difference, because the goods *were not sent to them in that capacity.* They were the correspondents of both parties, but they were to act in this case *for the security of the shippers.* * * * I cannot but be of opinion that *the cargo continued still the property of the shippers;* that Cunningham would not be legally answerable for the payment, and that in condemning the goods, I condemn nothing but what is legally considered as Spanish property."

In this case, Sir W. Scott refers to another as having been

lately decided in his court, where goods sent by a merchant in Holland to A, a person in America, by order and for account of B., with directions *not to deliver them unless satisfaction should be given for the payment*, were condemned as the property of the Dutch shippers.

The second case to which we would refer is that of the *Frances*, 8 Cranch's Reports, 354, (Dunham & Randolph's claim.) Dunham & Randolphs, merchants in N. Y., claimed certain bails and goods shipped by Alexander Thompson of Glasgow, a British subject. (this was during the war of 1812.) *The bill of lading was in their names, and the invoice purported to be on their account and risk.* The goods shipped to Dunham and Randolph were not precisely those in all respects which they had requested Thompson to send them. It was optional with Dunham & Randolph to reject them if so desired within a limited time. The property was condemned in the courts below as the property of Thompson, a British subject. Chief Justice MARSHALL delivered the opinion of the Court:

"It has been urged," he says, "for the appellants, that by the invoice and bill of lading, and the true construction of the letter of Alexander Thompson, the property was vested in Dunham and Randolph, liable to be divested by their rejecting the consignment within twenty-four hours after receiving the letters; that the condition annexed to the transfer is subsequent not precedent. The Court cannot concur in this reasoning. *It has been truly urged by the captors that to vest this property in Dunham & Randolph a contract is necessary; and that to form a contract the assent of two parties is indispensable. In this case no such contract appears. Had Thompson* UNCONDITIONALLY *consigned to them such goods as they had directed, the contract would have been complete, and the goods would, on being shipped, have become the property of Dunham & Randolph.* But Thompson has not done this. * * * There is "*a new proposition on which Dunham & Randolph are at liberty to exercise their discretion. They may accept or reject it, and until they accept it, the property remains in Thompson.*"

And in the Frances, (Dunham & Randolph's claim,) 9 Cranch, 183, a case of further proof, Mr. Justice JOHNSON,

delivering the opinion of the Court, said: "*A voluntary agent has the option* either to enter upon his agency in strict conformity with the instructions of his principal, or *with such reservations or conditions as he may think proper to prescribe;* and the only consequence is that in the latter case, he *leaves his principal at liberty to adopt or repudiate his acts.* The shipper, who purchases goods ON HIS OWN CREDIT, *or with his own funds, is not acting in the ordinary capacity of a factor.* There was nothing inconsistent with the relative rights of the parties in Thompson's imposing on the consignees the condition of taking all or none of the two shipments; and the consequence was that the condition was not absolute but qualified; and until the condition performed, the goods remained the property of the shipper; and had they suffered shipwreck, the loss would have been his."

The next case to which we would refer, is that of the *Merrimack*, 8 Cranch, 317—(claim of Kimmel and Albert.)

In that case, Kimmel and Albert, merchants of Baltimore, claimed seven packages of goods on board the Merrimack, which were purchased in pursuance of their orders by Bailey, Eaton & Bailey, merchants of Sheffield, England. The invoice and bills of lading, addressed to Messrs. Kimmel & Albert, were inclosed in a letter of 5th August, 1812, written by Bailey, Eaton & Bailey, to Sam'l McKean. Bailey, Eaton & Bailey, instructed McKean, in the event of war between the countries, *not to deliver the goods until they had received the amount of the invoices from the consignees in cash.*

Said Chief Justice MARSHALL: "The delivery on board the ship was not a delivery to McKean, absolutely for Kimmel and Albert, but for them provided *they acceded to new and distinct propositions made by Bailey, Eaton & Bailey.* In such a case, *no change of property could take place till Kimmel and Albert should accede to new propositions;* and the capture having taken place before the contract was complete, the goods must be considered as enemy's property." On these considerations, the decision of the Court below was reversed.

See also *The Frances*, (Irvin's claim,) 8 *Cranch*, 418.

In the case of the *San Jose Indiano*, (Lizan claimant,) 1 *Wheaton* 208, Chief Justice STORY said: "It is certainly

competent for an agent who purchases in pursuance of orders, to vest the property in his principal immediately on purchase. * * * But when a merchant abroad in pursuance of orders, either sells his own goods, *or purchases goods on his own credit, and thereby in reality becomes the owner, no property vests in his correspondent until he has done some notorious act to divest himself of his title, or has parted with the possession by an actual and unconditional delivery for the use of such correspondent. Until that time he has, in legal contemplation, the exclusive property as well as possession; and it is not a wrongful act in him, to convert them* TO ANY USE WHICH HE PLEASES. *He is at liberty to contract on any new engagements, or substitute any new conditions in relation to the shipment.* These principles have been frequently recognized. In the present instance the delivery to the master was not for the use of Mr. Lizan, but for the consignees, a house composed of the same persons as the shippers and acting as their agents, they therefore *retained the constructive possession as well as right of property in the shippers, and it appears that the shippers meant to reserve to themselves and to their agents in relation to the shipment all those powers which ownership gives over property.*"

In *Seymour vs. Newton*, 105 Mass., 273, the transaction was of precisely the same character as the one between McLaren & Co., A. F. Smith & Co., and the Milwaukee Bank. Seymour & Co., of Chicago, Ills., received an order from Fish, of Worcester, Mass., to purchase a certain quantity of lard, and to draw on him at three days sight. Seymour & Co. purchased the lard, sent an invoice of purchase to Fish, and drew a draft upon him, payable to the order of one Lombard, cashier of a bank in Chicago, and delivered to Lombard the draft, together with a railroad receipt, which, by its terms, consigned the lard to account "J. G. Lombard, cashier, care of F. W. Fitch & Co., Worcester, Mass." Lombard sent the draft to a bank in Worcester, and it was presented by the bank to Fish for acceptance, *the bank retaining the railroad receipt.* Fish accepted the draft, but before its maturity, became insolvent. The lard was attached by the creditors of Fish, as the property of Fish. Seymour & Co. paid Lombard the amount of the draft, and then brought replevin for the lard. CHAPMAN J., in his

opinion, says: "Thus the delivery of the lard to the carrier was *not a delivery to Fish as a vendee, but was a consignment to Lombard*, the obvious purpose was that there should be no delivery to the vendee until the draft should be paid." Seymour & Co. recovered the lard.

In *Cayuga Bank vs. Daniels*, 47th N. Y., 632, a bill of lading was in like manner transferred by the owner of property to a bank in consideration of the discount of certain drafts drawn by the seller on the purchaser. GROVER J., delivering the opinion of the Court says: "The conduct of Gutchess in taking the bill of lading from the captain of the boat, and delivering the same to the plaintiff, and procuring the discount on the credit thereof, shows that he did not intend to deliver the property to the carrier with intent to vest the title absolutely in the defendants, but only upon condition that they accepted and paid the drafts to be drawn against it." The learned Judge also holds that "a previous agreement of the owner to ship the property to the consignee" gave no title to the consignee as against the holder of the bill of lading; that the only remedy, if any, of the consignee, was an action for a breach of the contract.

Turner vs. Trustees Liverpool Docks, 6th Exchequer, 543, is an important case on this point. Higginson & Dean, of Liverpool, were owners of the schooner Charlotte. The Charlotte sailed from Liverpool for Charleston, S. C., on the 10th of August, 1847, with a cargo consigned to Menlove & Co. On the 18th day of August, the firm of Bartow, Irlan & Higginsons (of which firm Higginson & Dean were members) wrote a letter to Menlove & Co., in which they orderd the purchase, on their account, of 1,000 bales of cotton, to be sent by the Charlotte. Menlove & Co. acknowledged the receipt of this letter on the 10th of September, and in their reply stated that they had purchased some of the cotton; September 17th, they advised, by letter, further purchases of cotton, and on the 23d, wrote another letter, and advised the drawing of a draft for £4.000, "being on account of purchase of cotton per Charlotte." Other letters were written on the 25th of September, and 29th of October, advising further purchases; and on the 12th of October, they, by letter, gave notice of the loading of the Charlotte, and in the letter

stated that they were "unable to forward the invoice of her cotton, as much difficulty has been met with in getting the bills, one of which is still wanting, but you shall have it per next steamer, which may be in time for you." They inclosed in the letter an invoice of some pitch pine plank which had been purchased and put on board the Charlotte; on the 16th of October, they wrote that the "Charlotte got safely to sea on the 13th inst.," and advised the drawing of drafts, with the request that the drafts be honored, "being for the cargo on your account per Charlotte." On the 19th of October, they wrote another letter, enclosing abstract of the invoice, and on the 23d of October another letter, enclosing the invoice, which commenced thus: "Invoice of 1263 bales upland cotton, shipped by Edward Menlove & Co., on board the British ship Charlotte, Carter master, for Liverpool, by order and for account of Messrs. Bartow, Erlan & Higginson, *there and to them consigned.*" This letter contained the following passage: "The bank of whom our drafts on you were sold, required the delivery to the B. L. which we thought best to comply with," &c., The master of the Charlotte, on the 12th day of October signed, and delivered to Menlove & Co. a bill of lading, which, by its terms, made the property deliverable "unto order or to our assigns, he or they paying freight for the said goods, * * * *being owner's property.*" The bill of lading was endorsed: "Deliver the within to the Bank of Liverpool or order," and signed Edward Menlove & Co., and was transferred to a Charleston Banker as security for drafts which he discounted. Barten, Irlam & Higginson accepted some of the bills on presentment, but refused payment. Some of the bills were not accepted. Higginson & Deane were adjudged bankrupts. The assignees in bankruptcy of Higginson & Deane, brought this suit to recover the cotton. The real question in the case was whether by the delivery *on board of the vendee's own vessel*, coupled with this statement in the bill of lading that the cotton was the owner's property, and the forwarding of the invoice, the title had so passed to the vendees *as to render inoperative the bill of lading to the Charleston Banker.* The opinion of the Court was delivered by PATTERSON, J. He says:

"There is no doubt that a delivery of the goods on board

the purchaser's own ship, is a delivery to him, unless the vendor protects himself by special terms restraining the effect of such delivery. In the present case, the vendors, *by the terms of the bill of lading*, made the cotton deliverable at Liverpool, to their order or assigns; and there was not, therefore, a delivery of the cotton to the purchasers, as owners, though there was a delivery on board of their ship. The vendors still reserved at the time of the delivery to the captain, the *jus disponendi* of the goods, which he, by signing the bill of lading acknowledged, and without which, it may be assumed, that the vendors would not have delivered to them at all. The question really is, whether any and what effect is to be given to the *terms of the bill of lading, making the goods deliverable to the order of the vendors;* for if, by these terms they reserved to themselves the dominion over the cotton, it would not pass to the assignees. *The invoice would pass no property, whatever its terms might be; the property would only pass upon delivery;* and the only effect to be attributed to the form and expressions of the invoice or bill of lading, would be as indicating the terms upon which the goods were delivered." * * * * "*But the operative terms of the bill of lading as to delivery of the goods at Liverpool, and the letter of Menlove & Co., of the 23d of October*, SHOW TOO CLEARLY FOR DOUBT, *that notwithstanding the other terms of the bill of lading, and the invoice, Menlove & Co. had no intention, when they delivered the cotton on board, of parting with the dominion over it, or vesting the absolute property in the bankrupts.* Upon this part of the case, the decisions in the Court of Exchequer in *Van Casteel vs. Booker*, 2 Ex. 561, and *Wait vs. Baker*, 2 Ex., 1, are authorities directly in favor of the defendants."

The principle of this case has been affirmed by the Supreme Court of the State of Illinois in the case of *Ward vs. Taylor*, 46 Illinois, page 494.

In *Shepard vs. Harrison*, Law Reports, 4th Queen's Bench, 195, the doctrine of *Turner vs. Trustees*, &c., was fully affirmed.

In that case, Shepard & Co., of Manchester, England, sent an order to Paton & Co. of Pernambuco, to purchase a quantity of cotton. The cotton was purchased by Paton & Co., at Pernambuco, and an invoice was sent to Shepard &

Co. The invoice was headed as follows: "Invoice of 200 bales of cotton shipped per Olinda S. S., for Liverpool, on account and risk of Messrs. John Shepard & Co." In the letter enclosing the invoice was this language: "Enclosed, find invoice *and bill of lading*." The bill of lading was not sent in the letter, but was forwarded by Paton & Co., to their agent at Liverpool. The bill of lading was as follows: "Shipped on board the Olinda, &c., by Paton, Nash & Co., 200 bags, &c., cotton unto order, or to his or their assigns, he or they paying freight on delivery without deduction, &c., and was endorsed "Pernambuco, 13th November, 1867, Paton, Nash & Co." The agents of Paton & Co. at Liverpool, on receipt of the bill of lading, forwarded it with the drafts drawn for the purchase of the cotton to Shepard & Co., and requested the acceptance of the drafts. Shepard & Co. refused to accept the drafts, *but retained the bill of lading*, and sent it to their agent in Liverpool, with directions to pay the freight and obtain the cotton. Suit was brought by Shepard & Co. The question in this case was, whether they had obtained the title to the cotton. They were defeated. It was held that Paton & Co. by retaining the bill of lading and forwarding it to their agent at Liverpool, clearly showed an intention to retain the cotton until the draft was accepted. The case was carried to the Exchequer Chamber and the judgment was affirmed. (Page 491.) An appeal was taken to the House of Lords, and with a similar result. (Law Reports, 6 Queen's Bench, 796.)

In *Bailey vs. Hudson R. R. Co.*, 49 N. Y., 75, CHURCH J. says: "If the consignor procure an advance upon the bill of lading from third persons, or delivers or endorses the bill of lading to a third person for a consideration, it furnishes equally satisfactory evidence that *the property was not delivered to the consignee, for the simple reason that it was delivered to some one else.*

The case of *Pomeroy et als. vs. D. Wills et als.*, reported in the July number, 1873, of the American Law Record, page 1, presented substantially the same question. It was a suit in which one of two innocent parties was to be a loser. The Vinton County Bank had discounted a bill of Exchange, drawn by Long & Smith, on Pomeroy, Mendenhall & Co., and to which a bill of lading of certain iron was

attached. Pomeroy, Mendenhall & Co. had made advances to Long & Smith, under a special agreement to receive iron manufactured by Long & Smith, to sell on commission. The bank claimed the iron by virtue of discounting the draft and the delivery of the bill of lading. Pomeroy & Co. claimed it, by reason of their advances, under the agreement. *No bill of lading of the iron in question was forwarded to Pomeroy & Co.* The bank made the discount in good faith, and upon the credit of the bill of lading. YAPLE, J., says: "Long & Smith had no bill of lading made out for, or sent to the consignees. They retained it themselves, merely shipping the goods to the address of Pomeroy, Mendenhall & Co. The carrier was their agent alone, not of both parties. *This indicated a clear intention on their part, when they shipped the iron, to retain the title to it*, and its control and disposition, until it should actually be received by Pomeroy, Mendenhall & Co., at which time their possession would commence, and they be enabled to hold it for all previous advances. *So they, as owners did not part with the possession, and could pledge it as they did, by giving it into the possession of the bank by means of the bills of lading.*"

In *Tilden vs. Minor et als.*, 45 Vt., 96, the Merchant's National Bank of Chicago, discounted a draft drawn by a Chicago commission merchant, on one E. G. Culver, of West Hartford, Vt., for the purchase price of a car load of corn. At the time of the discount of the draft, a bill of lading, endorsed in blank, was delivered to the bank as security for the payment of the draft. The draft was sent by the Chicago Bank to the Woodstock National Bank "for collection and remittance," and with directions "to hold bill of lading subject to payment of draft." Culver obtained possession of the corn without paying the draft. The Court, on page 198, says: "The facts reported by the commissioners show that the Merchant's National Bank, Chicago, were the purchasers and owners of the draft. The endorsement and transfer of the bill of lading as collateral security for the payment of the draft, *vested in the bank the title to the cargo.*" * * * "The movement of the immense products of the West to the seaboard, involves the use of large sums of money, which requires confidence and

credit. To ensure that, the bill of lading has been held and regarded in law as the symbol and representative of the cargo. The assignment, for honest purposes, of the bill of lading, *is effectually the assignment of the cargo*, and since railways have made continents navigable as well as the sea, and immense products, and almost limitless tonnage are floated by their agency to the great central depots of commerce, the propriety and necessity of the rule becomes more apparent, and the duty of the Court to make it certain and inflexible more obvious. The act of taking possession of the corn by the trustee was wrongful and tortious, and created no debt *ex contractu* to any one. The corn was consigned to the *order* of the defendants, and the trustee had no more right to the possession of the corn than any other stranger."

The following cases also assert the same doctrine:

Wait vs. Baker, 2d Exchequer, 1.
Jenkins vs. Usborne, 49 Eng. Com. Law, 698.
Williams vs. Littlefield, 12th Wendell, 362.
Moakes vs. Nicolson, 115 Eng. Com. Law, 296.
Ellershaw vs. Magniac, 6th Exch. 570.
Jenkins vs. Brown, 68 Eng. Com. Law, 495.
Brandt vs. Bowlby, 2 B. & Ald. 632.

These authorities settle that William P. McLaren & Co., as unpaid vendors, or purchasing agents, had the right to so ship the wheat as to hold the title thereto, until their advances were paid.

Our argument, up to this point, has discussed the question on the assumption that there was no understanding or arrangement between McLaren & Co. and A. F. Smith & Co., that the wheat was to be held by McLaren & Co., subject to, and until payment of the drafts on the particular cargoes. The undisputed evidence is, that such was the understanding and agreement of the parties. In all cases of time paper, the property shipped was "not to pass out of the control of the bank, in whose care it had been placed, until all drafts against it had been paid." McLaren & Co. had not only the protection which the law gave them to reimburse themselves for the monies they advanced to purchase the wheat, but they had also the advantage of a distinct agreement with A. F. Smith & Co. The procuring the

drafts drawn on A. F. Smith & Co. to be discounted by the Milwaukee Bank, and the transfer of the bills of lading to that bank; the forwarding of the bills of lading with the special endorsements thereon; and the letter of instructions sent to the Merchant's Bank, were not only justified by the rules of law, applicable to a purchasing agent who advances money for, and on behalf of his principal, but was strictly in accordance with the terms of the special agreement; and the Circuit Judge is clearly right in saying: "That McLaren & Co., when they made this purchase, and paid for the goods with their own money, became the owners of the property; that they had the right to obtain the discount which they did upon the security of these bills of lading; that the proof shows, in fact, that such a procurement of discount was contemplated by all the parties in interest, or who expected to be interested in the wheat; that McLaren & Co. had a right, when they shipped the wheat, to impose such conditions upon its delivery to A. F. Smith & Co., as they saw fit; that, with their concurrence, the condition was imposed that the wheat should not be delivered till these drafts were paid."

It is unnecessary to do more than cite the authorities to the point that the National Exchange Bank of Milwaukee, by discounting the drafts, and receiving from the owner the original bills of lading, became vested with the legal title of the wheat covered by said bills of lading. This court has recently so decided in the case of *The Thames* 14th Wallace, 98. In that case, STRONG, J. says: "It must be considered then, that by the indorsement of the bills of lading, the libellant became *the owner of the cotton*, and that by force of the contract with the ship, it was deliverable at New York, only to him, or his order. Reference to authorities to show that the effect of the indorsement was to vest such ownership in Seaman is quite unnecessary. We may, however, refer to a few," &c.

In the *City Bank vs. R. W. & O. R. Co.*, 44 N. Y., 136, it is held that a bill of lading, which, by its terms, makes property deliverable to order or assigns, will pass the title to the property mentioned in it, *without endorsement*, if delivered with that intent.

The cases of the *Cayuga Co. Nat. Bank vs. Daniels*, 47

N. Y., 632, and the *Marine Bank vs. Wright*, 48 N. Y., 1, are sufficient authority in favor of the proposition that the National Exchange Bank of Milwaukee, by the transaction between itself and Wm. P. McLaren & Co. acquired the title to the wheat in question, and could hold the same as against any one claiming adversely to its rights.

If this argument is sound up to this point, then A. F. Smith & Co. had no title to the wheat on board the Kate Kelly, Grenada and Corsican, at the time these vessels left the City of Milwaukee. At this time, A. F. Smith & Co. had accepted no drafts, and paid no part of the purchase money on these cargoes. It was not known whether or not they would pay the sight drafts, or accept the time drafts. This being the fact, the Milwaukee Bank, having both title and possession, and having paid its money for the bills of lading, had the right to prescribe the terms and conditions upon which it was willing to part with the title and possession of the wheat, and it was optional with A. F. Smith & Co., when advised of those terms, to assent to them and accept the wheat, or to reject the title and allow the wheat to be otherwise disposed of by the Milwaukee Bank.

The evidence is clear, that the Milwaukee Bank did prescribe the only conditions upon which it would part with its title and possession. There is not, and cannot be, any doubt or uncertainty as to what the conditions are. They are written out in distinct language, on the back of each bill of lading, and repeated in each letter of instruction to the Merchant's Bank, and by that bank are substantially repeated in its letters to the proprietors of the Corn Exchange Elevator, and in the orders enclosed in those letters to the captains of the Kate Kelly, Grenada and Corsican. Briefly stated, A. F. Smith & Co. are to have the title and the possession of the wheat, only upon payment of the drafts drawn upon it. Before paying the sight drafts, or accepting the time drafts, on either of the cargoes, A. F. Smith & Co. were fully advised by the letters they had received from the Merchant's Bank, and the orders sent to them to be delivered to the captains of the vessels, that the wheat was to be delivered to the "*Corn Exchange Elevator for the account of William G. Fitch, subject to the order of the Merchant's Bank until the drafts were paid.*" With this knowledge of

36, Maryland 590

11 American Rights 514,

the conditions imposed, A. F. Smith & Co. pay the sight drafts and accept the time drafts. They return the accepted time drafts to the Merchant's Bank without objection, and by so doing they signify their assent and approval of the conditions imposed. They thereby enter into a contract with the Milwaukee Bank for the wheat, and agree to the terms and conditions it imposed. By the terms of this contract neither the title or possession of the wheat is to pass to A. F. Smith & Co. until the drafts are paid. Payment of the drafts is made an absolute condition of passing the title and possession. The language of the Circuit Judge is peculiarly apt and expressive on this point. He says: "If they, (A. F. Smith & Co.,) were not satisfied to accept the drafts upon these terms and conditions, they were quite at liberty to refuse them; they were quite at liberty to say, and then was the time and place to say it, we never authorized the purchase and shipment to us, on the drafts to be drawn upon us, accompanied by the condition that the wheat should not come into our hands and be under our complete control on our acceptance of the drafts; that by making acceptance of the drafts, with that knowledge they consented to receive the wheat, not as owners or purchasers, but *they took it into their possession as warehousemen*, and with no title to it whatever except the right to pay the drafts, and so become invested with a legal title." The payment of the sight drafts, and the acceptance of the time drafts, without objection, and with full knowledge of the conditions, was an assent to, and an acquiesence in the terms and conditions expressed in the letters and orders. A. F. Smith & Co. are concluded by the contract they voluntarily entered into. They cannot accept a portion of the contract and reject the remainder. They cannot affirm a part and disaffirm the balance.

In *Dent vs. N. A. Steamship Co.*, 49 N. Y., 391, a letter was written, stating the terms of a contract, and which was delivered to, and accepted by the defendant. On the trial, evidence was offered of a parol agreement made prior to the writing of the letter. It was excluded.

RAPPALLO J. says:—"We are of the opinion that the evidence was sufficient to sustain the finding of the Referee that the letter of Sept. 11th 1866 constituted the contract; although

the resolution of the board of the defendants, ratifying the purchase of the steamship by Mr. Webb on the terms and conditions set forth in the letter, may not have been communicated to the plaintiffs, yet *after the receipt of the letter, by Mr. Webb, the defendant took possession without any dissent from the terms stated in the letter; this constituted an acceptance of and acquiesence in the terms expressed in the letter, and the plaintiffs had the right to rely upon it as an assent to those terms.*"

The case of *De Wolf vs. Gardiner*, 12*th* Cushing 19, is also in point. Gibson accepted drafts drawn on him knowing of the terms of the consignment. It was held that "*his acceptance of the drafts, was an assent to the consignment upon the terms proposed.*"

Before the arrival of the wheat in Oswego there was then a valid agreement, assented to by A. F. Smith & Co., that the wheat, on its arrival, should be stored in the Corn Exchange Elevator "for the account of W. G. Fitch Cashier, subject to the order of the Merchant's Bank until the drafts were paid."

Under this agreement no title could vest in A. F. Smith & Co. without the consent of the Milwaukee Bank or its authorized agent. The Milwaukee Bank never gave any authority to its agent to pass the title to this wheat, except upon payment of the drafts. This brings us to the consideration of the nature and extent of the agency of the Merchant's Bank.

II.

The Merchant's Bank was a special agent for a special purpose, and clothed only with special and limited powers to do a particular act with particular named parties.

"The distinction between the powers of a general and special agent are well understood. If a special agent goes beyond the scope of his authority, his principal is not bound by his acts, and the party who deals with him, must, on his own responsibility, see that the agent has authority to the extent to which he professes to act." (15th Gray, 150.)

The case of *Russell vs. Minor*, 22d Wendell, 659, illustrates this principle. Beach and others, as co-partners, were manufacturers of paper. They made a contract with one Minor to furnish him a quantity of paper. Minor was to give his notes on delivery of the entire quantity. Beach and his co-partners being indebted to one Russell, turned out to him the paper. Beach was directed by Russell to ship the paper and apply it on the contract with Minor. A portion of the paper was delivered to Minor, and at the time of its delivery Minor promised that he would give his note when the remainder was delivered. The balance was delivered, but Minor refused to give his notes. Russell instituted two suits to recover the paper—one for the parcel first delivered, and the other for the parcel secondly delivered. In the second suit Russell was non-suited. He recovered in the first suit. The point was made by Minor that there had been an absolute delivery of the paper. The question of the extent of the agency of Beach to make the delivery without obtaining the note, was directly presented.

EDWARDS, J. on page 663, uses this language: "Could Beach, as his agent, divest him (Russell) of the interest he held in the property, and transfer it to the defendant without his consent? In my judgment he could not. *As agent, Beach had no such authority.* He was a special agent, and all the authority he had was to deliver the paper on the contract already made, and take the note payable in six months, and for no other purpose was he entrusted with the paper. If the note was not given according to the contract he was not even authorized to deliver the paper, and any such delivery, or any new agreement he might make without authority, could not affect the right of the plaintiff. Being *a special agent, for a special purpose, he could not proceed beyond the scope of his authority, so as to affect the rights of his principal.* If property is entrusted to a carrier, and he turns it out in payment of his own debts, the owner's rights are not thereby affected."

The case of *Lyon vs. Kent*, 45 Alabama, 664, illustrates this principle. In that case, an order was given by Kent, Payne & Co., to James W. Singleton, in these words:

"DAVID BROWDER, ESQ.,

Montgomery, Ala.

"You will deliver to James W. Singleton and associates, all the cotton purchased by you for our account stored at various points, amounting to between four and five hundred bales, the precise quantity not being recollected. and oblige yours most truly,

KENT, PAYNE & CO."

Singleton sold the cotton to one Guy, who purchased, without notice of any want of title in Singleton. The cotton was stored with Lyon & Kent for Guy. Kent, Payne & Co. brought an action against Lyon & Kent to recover the cotton. The defence was that it belonged to Guy. The above order was all the authority Singleton had from Kent, Payne & Co. There was a dispute between the parties as to the purpose for which Kent, Payne & Co. gave the order to Singleton. The Court says, on page 666: "There is no evidence that any of the parties to the transaction intended to act in bad faith, or fraudulently. The only evidence of title to the cotton, possessed by Singleton and his associates, was the order to Browder and President Lincoln's pass, so far as that was connected with the case. *These did not show ownership or a power to sell.* This was nothing in his favor, unless Kent, Payne & Co. had authorized him to make such declaration. There is no proof that they did."

In *Wooster vs. Sherwood*, 25 N. Y., 287, a third party had purchased a quantity of barley malt from a brewer, and which was on storage in the brewery. The opinion says: "This case falls within the rule that whoever deals with *an agent constituted for a special purpose, deals at his peril, when the agent passes the precise limits of his power.*"

Wilson vs. Nason, 4th Bosworth, 155, is directly in point on this proposition. In that case, a person living in the interior of the State of New York, shipped a quantity of wheat to a house in Troy, N. Y. The wheat, to reach Troy, had to be transported in lake vessels to Oswego, and from thence to Troy by canal boats. Transhipment was necessary at Oswego. Matthews was employed as the agent, for a commission paid him, to superintend and effect the tran-

shipment. Sometimes the wheat was deposited in Oswego to await the arrival of canal boats. The bill of lading was, therefore, endorsed "*care* of H. Matthews, Oswego." Matthews got possession of the wheat, on its arrival at Oswego, and *deposited it in his own bin, in common with his own wheat and that of others.* "He was merely a receiving and shipping agent, his duty being to pay lake freights, etc., and forward the property." It was held that the owner of the wheat could recover the same, or its value, from parties who had purchased or made advances on bills of lading obtained by, and issued in the name of Matthews. "The case," says the Judge, on page 168, "seems merely this, the owner of goods has employed an intermediate agent only to forward them to their destination. Necessity or convenience places the property temporarily in that agent's possession—he has *no authority to sell or pledge, he is not entrusted with any of the documents of apparent ownership.* He wrongfully appropriates the goods and an honest purchaser obtained them from him. The original property, and right of the owner are not divested. His power to reclaim the goods or their value is not lost."

The following cases also sustain and illustrate this point:

Parsons vs. Webb, 8th Greenleaf, 38.
Conan vs. Adams, 1st Fairfield, 374–80.
Hodge vs. Coombs, 1st Black, 192.
Doubleday vs. Kress, 50 N. Y. 410.

"The distinction between general and special agency," says STRONG J. in 9th Wallace 773, "is in most cases a plain one. The purpose of the latter is a single transaction with designated persons. It does not leave the agent any discretion as to the persons with whom he may contract for the principal if he be empowered to make more than one contract."

The special endorsements on the back of each bill of lading, and the minute and specific instructions in each letter enclosing the bills of lading to the Merchant's Bank, bring that Bank clearly within the rule above laid down as to what constitutes a special agency. The Merchant's Pank had no discretion conferred upon it; it was to do particular acts with particular named parties.

There were no secret instructions given by the Milwaukee Bank. The "instructions" were on the bills of lading as well as in the letters. These were all that were given and to call them "secret instructions" is to say that a principal could not give a special authority to his agent. They were and are, in the strictest sense, limitations upon the authority of the Merchant's Bank in relation to the cargoes of wheat named in them.

If, therefore, the Merchant's Bank, acting under this special authority, had made an absolute delivery of the wheat to A. F. Smith & Co., without receiving payment of the drafts, it would not have passed to them the title of the wheat as against the Milwaukee Bank, and for the reason that no authority was conferred by the Milwaukee Bank upon the Merchant's Bank to make any such delivery; and it is clear that Messrs. Dows & Co. could acquire no other or better title, from A. F. Smith & Co. than they themselves had.

Messrs. Dows & Co. are certainly in no better position, in obtaining the wheat from A. F. Smith & Co., than they would have been had they made the purchase directly from the Merchant's Bank; and it seems too plain for argument, that no third party could have obtained any title to the wheat by purchase from that Bank. The bills of lading, with the endorsements thereon, would have been notice to all persons dealing with the bank for the wheat; and if Messrs. Dows & Co. could not acquire the title to the wheat by a purchase directly from the Merchant's Bank, they could be in no better condition as to title if they obtained the wheat from parties who received it from the Merchant's Bank before payment of the drafts.

But it would be doing violence to the transaction, as exhibited in this record, to say that the Merchant's Bank made, or attempted to make, any delivery of any of the cargoes in question to A. F. Smith & Co., with the intent to vest them with an absolute title to the wheat, or any part of it. The correspondence of the cashier of the Merchant's Bank shows that he recognized the fact that A. F. Smith & Co. were acting in the dual capacity of warehousemen and commission merchants; that he knew them to be the proprietors of the Corn Exchange Elevator in Oswego; and that

all the custody or possession he intended to give, and did give, to A. F. Smith & Co., was simply and only the storage of the wheat in their warehouse for the account of his principal, and subject to his order, until the drafts drawn on the particular cargoes were paid. And this brings us to consider the question, whether the Merchant's Bank had a right to deposit the wheat in the warehouse of A. F. Smith & Co., and whether the wheat was so deposited.

III.

The Merchant's Bank had a legal right to select the Corn Exchange Elevator as the warehouse in which to store the wheat until the maturity of the time drafts.

It was neccessary that the wheat, on its arrival at Oswego should be unloaded from the lake vessels and stored in some warehouse until the drafts matured. The Corn Exchange Elevator was a large warehouse, fitted up with all the conveniences for unloading and storing the wheat. A. F. Smith & Co. were its proprietors, and their reputation as warehousemen was good.

There are many cases which show that a vendee has the right to leave property purchased in the hands of the vendee; and, in so doing, he does not forfeit his title to the property, even as against third parties purchasing in good faith from the vendee. In other words, the vendee may be a bailee for the vendor.

In *Kimberly vs. Patchin*, 19 N. Y., 330, one Shuttleworth purchased of Dickinson 6000 bushels of wheat. The wheat was in a warehouse owned by Dickinson. Dickinson gave to Shuttleworth a receipt, stating that he had received the same in store, subject to the order of Shuttleworth, free of all charges on board. Dickinson, without the knowledge of Shuttleworth, shipped the wheat on board a lake vessel—obtained from the captain a bill of lading—drew a draft on parties in Buffalo, with the bill of lading attached, and forwarded them to Buffalo. The parties paid the draft, and claimed the title to the wheat, by virtue of the payment of

the draft and the bill of lading. Shuttleworth sold his interest in the wheat to a third party, and that party brought suit against the vendee of Dickinson to recover its possession, and succeeded in his action.

The case of *Burton vs. Curyea*, 41st Ills. 320, illustrates this rule. Curyea brought an action against Burton to recover five hundred barrels of pork. Curyea had purchased the pork from Daggett & Whiteside, who were packers of pork as well as commission merchants. Wishing to have the pork re-packed, Curyea left it in the custody of Daggett & Whiteside. The latter firm sold the pork to Burton, or his vendee. It was claimed that Curyea, by this act, had enabled Daggett & Whiteside to deceive third parties. Curyea had been obliged to deliver to Daggett & Whiteside his warehouse receipts in order to enable them to get the pork to repack it. The Court, in its opinion, on page 331, says: "If Curyea in this case had placed the warehouse receipts in the hands of Daggett & Whiteside for any other than a legitimate purpose, or if he was fairly chargeable with any negligence, by means of which they had been enabled to impose upon the bank, a different rule might be applied. But we can discover no negligence on his part, nor any departure from the ordinary course of business. He certainly had the right to have the pork re-packed, *and to employ Daggett & Whiteside, who had packed it in the first instance, for that purpose.* To accomplish this, it was necessary to enable them to remove the pork from Burton's warehouse, and this could only be done by the surrender of the warehouse receipts." Curyea recovered his pork.

In *Gibson vs. Stevens*, 8th Howard, 384, the purchasers left the property in the possession of the vendors. Chief Justice TANEY, on page 398, says: "The documents hereinbefore mentioned, transferred the property and the possession of the pork and flour to McQueen & McKay, *and the vendors from that time held it for them and as their bailees.*"

In *Thayer vs. Dwight*, 104 Mass., 257, the Court says: "We do not understand that a pledgee loses his lien by permitting the pledgor to have possession or control of the property for *a special and limited purpose, consistent with the enforcement of the lien*, and not for his own use merely."

In *Schotsman vs. L. & Y. R. Co.*, 1st Equity Cases, page 357, the Court says: "It is very important to observe, and yet it should always be borne in mind that there is a distinction between Mr. Cunliffe, or Messrs. James Fort & Co., (which ever name you choose to call him by,) and Messrs. Watson, Cunliffe & Company. They are two distinct sets of persons. It is very true that Mr. Cunliffe was, (if I may use a species of anomalous expression,) the sole partner in one firm, and that he was a partner with another person in the other firm. But they are totally separate and distinct characters, and in courts of law we have frequently to deal with that circumstance. *One man frequently unites in his own person different characters. He may be a consignee and executor, but what he does as an executor does not affect what he does as a consignee.*"

In *Wooster vs. Sherwood*, 25 N. Y. 278, the barley malt, the subject matter of purchase, was left by the vendee in the brewery of the vendor. WRIGHT, J. on page 285, says: "There was no removal of the barley by the plaintiffs, but this did not affect or change their rights. *By the terms of the contract the grain was to be malted in the brewery*, and had they removed it after delivery and then brought it back to be manufactured their rights would be the same as they now are."

In *Hamilton vs. Bell*, 10 Exchequer, 544, the buyer purchased some clocks of a jeweller, and left them in his possession. The jeweller was declared a bankrupt. His assignees claimed the clocks on the ground that the jeweller was the "reputed owner" of them within the meaning of the English bankrupt act. It appeared that the jeweller was in the habit of cleaning and repairing clocks and watches, and which work was done in the same shop where clocks and watches were exposed for sale. The purchaser of the clocks brought suit against the assignees to recover them. ALDERSON, B., on page 550, says: "*But if, as here, the goods are left in a shop where it is notorious that goods are placed for other purposes than sale, namely, for the convenience, of the owners, the conclusion* CANNOT BE REASONABLY DRAWN *that the goods are the property of the shopkeeper.* In this case it is notorious that the clocks were left in a shop where it is notorious that persons leave their clocks to be repaired; how

the draft and the bill of lading. Shuttleworth sold his interest in the wheat to a third party, and that party brought suit against the vendee of Dickinson to recover its possession, and succeeded in his action.

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then can we draw the conclusion that the bankrupt was the reputed owner of them? When we find that the shop-keeper is not the owner of even the larger portion of the goods in the shop. how can we conclude that he is owner of any? In such a case the criterion which the statute provides does not apply, and the only question is whether the bankrupt is the true owner or not."

In *Whitefield vs. Brand*, 16 Meeson & Welsby, page 282, books had been left with a book-seller for sale. It was shown to be a part of the book-seller's trade to sell books on commission. Whitefield had deposited with the book-seller a large number of books to be sold on commission. The bookseller being adjudged bankrupt his assignees sold the books or some of them, and the action was to recover their value. The assignees claimed them by virtue of a provision of the bankrupt law which declared that any person having "the possession, order or disposition" of property, shall be deemed "the reputed owner" thereof. PARKE, B. on page 284 says: "It appears to me that in this case the bankrupt received the deposit of the books in question *not as owner, but as factor*, and as such he had possession but with authority to sell." PLATT, B. on page 286 says: "It is notorious that book-sellers carry on business as factors, which excludes all presumption that the books held by the bankrupt were held by him as their owner."

In the notes to the leading case of *Lickbarrow vs. Mason*, vol. 1, part 2, 2d. Smith leading cases, (sixth edition), it is said: "Although the right of stoppage cannot be exercised after the goods have been actually, or even constructively, delivered to the purchaser, still, placing them on his wharf, *or depositing them in his warehouse*, will not, it is said, operate as a final delivery, or terminate the transaction, if done without his consent, *or in the face of a declaration that he accepts them for safe keeping, and as a trust for the vendor.*"

In the case of *Davison, et als. vs. City Bank*, in the Supreme Court of the State of New York, it appeared that A. F. Smith & Co. had sent an order to Mower, Church & Bell, of Milwaukee, in the month of September, 1869, to purchase a cargo of wheat. It was purchased by them, and the drafts drawn by them on A. F. Smith & Co., were discounted by

the Milwaukee National Bank of Wisconsin. The sight draft was paid by A. F. Smith & Co. and the time drafts accepted. The bill of lading, with the drafts attached, was sent by the Milwaukee Bank to the City Bank, Oswego; and the property was declared, on the face of the bill of lading, to be for "the account of T. L. Baker, care of the City Bank." On the arrival of the wheat at Oswego, the cashier of that bank wrote an order on the bill of lading retained by the captain, in these words: "Deliver to the Corn Exchange Elevator, for the account of T. L. Baker, cashier, Milwaukee, subject to the order of the City Bank, Oswego, October 9th, 1869, D. Mannering, Cashier." The wheat was delivered, under this order, and a receipt given on the back of the captain's bill of lading, similar to those signed for the cargoes of the Kate Kelly, Grenada and Corsican. A. F. Smith & Co. paid a portion of the freight in money, and the balance in drafts on New York. Davison was part owner, and the captain of the vessel; and the drafts not being paid on presentation, he, and his co-plaintiffs instituted a suit against the City Bank to recover for the unpaid freight, and on the trial surrendered the drafts, claiming that they were not received in payment of the freight. They recovered. On appeal to the General Term, MULLEN J. says: "The wheat was, by the bills of lading, to be delivered to the defendant. No other person or party was indicated as consignee. If we could enquire into the arrangement between Mower, Church & Bell, the Milwaukee Bank, and Smith & Co., it would appear that it was the understanding and intention of the parties that the defendant should control the wheat until the drafts drawn against it were paid. It was, therefore, the consignee. It was authorized to retain and receive the property, and upon payment by Smith & Co., was to deliver it to them. *The bank did receive the wheat from the vessels, and directed it to be deposited in the Corn Exchange Elevator, subject to its order. When in the Elevator, therefore, it was in the custody and under the control of the defendant.* If the defendant is not consignee, it would be impossible to create one." Judgment was affirmed, and the City Bank held liable as consignee for the unpaid freight.

An appeal was taken from the judgment of the General

Term to the Commission of Appeals, and the judgment was affirmed. FARR, *Com.*, says: "It (the City Bank) accepted the wheat by directing it to be delivered to the Elevator, subject to its order. The wheat, after such delivery, *remained under its control, and it had all the possession it could take or be expected to have.*"

The long line of authorities which hold that when a sale is conditional, and the seller retains some special claim on the goods, until the discharge of which the title is not to pass, the allowing the vendee to take them is not considered as an absolute surrender of possession by the vendor so as to give the title to the vendee until the condition is performed, sustain the proposition.

Coggill vs. H. & N. H. R. Co., 3d Gray, 545.
Couse vs. Tregent, 11th Michigan, 65.
Dehon vs. Bi jelow, 8th Gray, 159.
Brown vs. Haynes, 52nd Maine, 578.
Hotchkiss vs. Hunt, 49 Maine, 213.
Parmlee vs. Catherwood, 36 Missouri, 479.
Ulmann vs. Barnard, 7th Gray, 554.
Miller vs. Stevens, 100 Mass., 518.
Hirschen vs. Cunney, 98 Mass., 150.
Herring vs. Hoppock, 15 N. Y., 409.
Palmer vs. Hand, 13 Johns, 434.
Cragin vs. Coe, 29th Conn., 52.
Ballard vs. Burgett, 47 Barbour 646.
Kimball vs. Jackman, 42 N. Hamp., 242.
Fisk vs. Ewen, 46 N. Hamp., 173.
Buckmaster vs. Smith, 22d Vermont 203.
Holmark vs. Malin, 5 Cold. (Tenn.) 482.
Moakes vs. Nicholson, 115 Eng. Com. Law, 290.
Hunter vs. Warner, 1st Wis. 141.
Ballard vs. Burgett, 40 N. Y., 314.
Austin vs. Dye, 46 N. Y., 500.
McGoldrick vs. Willits, 52 N. Y., 318.
Clark vs. Wells, 45th Vermont, 4.

In the case of *Ballard vs. Burgett*, 40th N. Y., 314, the facts were these: The plaintiffs sold to Frame a yoke of oxen, with the agreement that the oxen were to remain their property until paid for; *the oxen were delivered to Frame*

under this agreement, and he sold them to the defendant, who purchased without notice of the plaintiff's claim Suit was brought by the plaintiff against the purchaser, to recover the oxen or their value. The plaintiffs succeeded in the action. GROVER, J. after a full discussion of the law, concludes that upon "principle and authority" the purchaser from Frame acquired no title to the oxen. LOTT, J. on page 320, says: "Conceding that Frame, under that agreement, took possession of the cattle, * * * *such possession was not as owner*; he, at most, was only entitled to the use of them, until payment of the price agreed to be paid, *and the title, by the terms of the contract, in the mean time, continued in the plaintiffs*. When he made the sale to the defendant, he had not paid the stipulated price, and consequently had not become the owner of the property."

In *Couse vs. Tregent*, a piana forte was sold conditionally, or agreed to be sold, to one Hamilton, *and possession given to him*, he certifying by an agreement in writing delivered to Couse, "that the same was to remain the property of said Couse, and subject to his direction, until the full sum agreed to be paid by Hamilton therefor should be paid, &c." Hamilton subsequently sold the piano to Tregent, who "bought in good faith and without knowledge of Couse's rights or claim." Couse brought an action of replevin. MARTIN, CH. J. says: "The right of the owner of chattels to sell the same conditionally is as old as the right to loan them, and I cannot perceive how *the possession by the conditional purchaser* is any more a means of defrauding parties than that of the bailee of goods for hire. *So long as the condition is not waived, and remains unperformed, the property does not vest in the purchaser.* * * * What right has a purchaser of chattels, from a conditional purchaser, as against the absolute owner, that he would not have if the purchase were from a bailee? The possession is the same, and the ownership is the same substantially; certainly the same opportunity for the perpetration of fraud exists in the one case as in the other."

These cases are to the point, that a vendor may select and appoint his vendee a bailee of the property purchased, and when the fact is made to appear that the vendee stands in

that relation, the vendor will not lose his title, even against a third party purchasing in good faith.

By the contract between the Milwaukee Bank and A. Smith & Co., the latter was to become the owner of t wheat, only upon complying with certain conditions. H the wheat been absolutely delivered to A. F. Smith & C by the Merchant's Bank, the Milwaukee Bank would n by that act have been divested of its title to the wheat, that would have been an act beyond the scope of the agen But there can be no pretense that a delivery to A. Smith & Co., as warehousemen, would give them a bet title than they would have had if the wheat had been del ered to them as vendees, subject to the payment of t drafts. And this brings us to consider the character in whi they received the wheat.

A. F. Smith & Co. were the proprietors of a large wa house in the city of Oswego. This fact was known to t Merchant's Bank. The Merchant's Bank had no authori from the Milwaukee Bank to make an unconditional deli ery of the wheat to A. F. Smith & Co. Its authority, already shown, was of a very special and limited charact It was necessary that the wheat be stored until the dra matured; and the Merchant's Bank selected, as it might gally do, the "Corn Exchange Elevator," as the warehou in which to store it. Having the right to select a wa house, the question is, did the Bank select that warehou and make delivery of the cargoes into it for the account the Milwaukee Bank? This question must be settled by t construction of the letters addressed to the "Proprieto of the Corn Exchange Elevator," and the orders enclosed those letters to the captains of the lake vessels. The lette and orders are in writing, and the language in them is pla and unambiguous. They express, in clear and explicit la guage the intent and purpose of the Merchant's Bank, a therefore, it is the duty of the Court to interpret and constr them.

Brook vs. Hook, Law Reports, 6 Ex., 93.
Ranny, vs. Higby, 5 Wis., 70.
Esser, vs. Lindermann, 71 Penn., 80.
United States vs. Shaw, 1*st* Cliff., 321.

IV.

The letters of the Merchant's Bank and the orders to the captains of the lake vessels clearly show that the wheat was to be delivered to the Corn Exchange Elevator for the account of William G. Fitch, Cashier, subject to the order of the Merchant's Bank.

The Merchant's Bank, as before stated, had no authority to deliver the wheat to A. F. Smith & Co., as vendees, until the drafts were paid. There was, therefore, a good reason for the Cashier of that bank taking special care to inform A. F. Smith & Co., before they paid the sight drafts or accepted the time drafts, of the exact terms upon which they were to have the title to the wheat.

The letters enclosing the sight drafts for payment, and the time drafts for acceptance, are addressed to "A. F. Smith & Co." The letters enclosing the orders to the captains for the delivery of the cargoes, are addressed to the "Proprietors of the Corn Exchange Elevator," or those words are added to the address. When the Cashier wishes to deal simply with the firm of A. F. Smith & Co., he addresses them solely in the firm name. When his business relates to anything connected with the use of the warehouse he styles them by the proper title to indicate that intention. His letters to the "Proprietors of the Corn Exchange Elevator" are to the effect that orders are enclosed to the captains of the lake vessels to deliver their cargoes to the *Corn Exchange Elevator for the account of William G. Fitch, Cashier, subject to the order of this bank.* Is this language which a business man would employ if he intended to deliver the property into the absolute control of A. F. Smith & Co.? Is it not, on the contrary, just the language which would be used by one who intended to hold the custody and control of the property? It is too plain for argument that the language of the letters and orders was intended by the Cashier of the Merchants Bank to express simply storage of the wheat in the Corn Exchange Elevator.

The Cashier did not intend to violate the instructions given by the Milwaukee Bank. He had no motive for so doing. His intention, as expressed by his language, is that the property is to be stored in the Corn Exchange Elevator for the account of his principal, until all the drafts against the particular cargo are fully paid. Had he written the same language in letters addressed to any other warehouseman in Oswego, no one would, or could claim that he could have meant or intended anything different than storage of the cargoes. The language must mean the same when addressed to the "Proprietors of the Corn Exchange Elevator." It cannot mean one thing when addressed to John Doe, and another and different thing when addressed to A. F. Smith & Co., or the Proprietors of the Corn Exchange Elevator. Nor can A. F. Smith & Co. legally, or honestly, claim that they did not know or understand the purport of the letters and orders. They admit they received both the letters and orders, and that the captains, or the vessel owners, *called at their office and received the orders before they delivered the cargoes;* they do not claim that they were ignorant of the contents of the letters and orders; on the contrary they admit that the language in them is clear and explicit, and express what the cashier wished done. Knowing, as they did, the exact language of the letters and orders, they were "quite at liberty" to decline receiving the wheat subject to such terms and conditions. But after receiving the letters and the orders, and after they had delivered the orders to the captains, *and thereby received the cargoes and accepted them*, they are estopped from asserting or claiming that they did not receive the wheat "for the account of W. G. Fitch, Cashier, subject to the order of the Merchant's Bank." To permit A. F. Smith & Co. to deny that they so received the wheat would be to work a fraud on the Milwaukee Bank; would be to permit them to accept the wheat and reject the conditions imposed. This cannot be done. "No person shall be allowed at once to benefit by and repudiate an instrument, but if he chooses to take the benefit which it confers he shall likewise take the obligation or bear the onus which it imposes. *No person can accept or reject the same instrument.*" (*Hermann on Estoppel*, title Election.) A. F. Smith & Co. knew, when they receipted for the cargoes on

the backs of the bills of lading retained by the captains, that the title of the wheat was in the Milwaukee Bank; they knew that the Merchant's Bank held the original bills of lading for the Milwaukee Bank; they knew no bill of lading, and no copy of any bill of lading, had been sent to them; they knew that the wheat was to go into their warehouse for storeage, for the account of William G. Fitch, and not to be moved except upon the order of the Merchant's Bank. Knowing all this they must be presumed to have consented to receive the wheat, subject to the terms of the orders.

In *Cobb vs. Dows*, 6th. Selden, a written order was given to deliver wheat from store No. 12. By mistake wheat was delivered from store No. 11. Brown, J. delivering the opinion of the Supreme Court, on page 349 says: "The order given by the defendant was explicit in its diretion, to deliver the wheat from building No. 12. It indicates all the defendants had done, *and all they meant to do. It could not be misunderstood by those to whom it was given or to whom it was directed*; and to construe it into authority to deliver wheat from No. 11, or any other place, would be to pervert the uses of written language."

That the letters and orders of the Merchant's Bank cannot be construed as a delivery of the wheat to A. F. Smith & Co, as vendees, or in any other capacity than to hold as warehousemen, will be more apparent if we examine with more particularity of detail the situation of the parties and their relations to each other.

A. F. Smith & Co. were engaged in two distinct, independent kinds of business in the city of Oswego. They were commission merchants, known as such; they were known to be extensive dealers in produce; they bought and sold large quantities of grain for and on their own account, and doubtless for and on account of third parties. They were equally as well known to be the proprietors of the "Corn Exchange Elevator" in that city. As proprietors of this warehouse, they held themselves out to the public as warehousemen; they received grain from any and all persons who chose the elevator either for storage or trans-shipment; the elevator was only the conduit to pass grain from one boat into another; it performed the same office, which, prior to the days of "elevators" was done by hand labor. As

warehousemen, A. F. Smith & Co. received grain in store. It is plain that as commission merchants and warehousemen they were engaged in two distinct kinds of business. It often happens that persons are engaged in several different kinds of business at the same time. A miller receives grain to grind into flour and holds himself out to the public in that capacity. He at the same time buys and sells grain and flour. A jeweler receives watches or jewelry to repair; he also buys and sells watches and jewelry. A tanner receives hides to manufacture into leather: he may also buy and sell hides and leather.

A common carrier may have, own and control warehouses, and perform the duties of warehouseman. These are simple illustrations, but they show clearly that a person may select and carry on as many distinct, independent occupations as he pleases. Now, Smith & Co. carried on, at the same time, the two distinct, independent occupations of commission merchants and warehousemen. Whoever, therefore, dealt with the firm of "A. F. Smith & Co." was bound to know the fact that they were engaged in two distinct, separate branches of business. As commission merchants they were not warehousemen. As warehousemen they were not commission merchants. The relations and undertakings of the two kinds of business were widely different.

There is one further and important fact which must not be overlooked. These elevator warehouses are now found at all our lake ports. "Elevators" have become an important and necessry instrument in the trans-shipment of grain. They fill a needed want in the movements of the produce of the country to market. Its transportation could not be successfully carried on in these days without this class of warehouses. The Messrs Dows & Co., as large operators of grain and produce, and as commission men, know that all or nearly all the grain which finds its way from the Western States to New York City, on its passage, must go into and out of these elevators. Scarcely a bushel of grain now goes into a lake vessel, at any port on the lakes, except as it passes through an elevator; nor is wheat unloaded from lake vessels at Buffalo or Oswego, or the lake ports, except by or through elevators. The quantity of grain which annually passes through elevators at different points in the country

amounts to millions of bushels. They are constructed to meet the demands of commerce.

The rapidity with which grain is taken from, or put on board of a vessel, by these elevators, makes the use of this particular class of warehouses absolutely necessary. And yet it may be safely affirmed, that there is not a lessee or proprietor of an elevator warehouse, who is not at the same time a dealer in the products, which, from the very necessity of trade, must pass in and out of his elevator. With these facts before us it is plain that the letters and orders of the cashier of the Merchants Bank, were only the designation of a warehouse. The cashier, by his orders, says to the captains: "Deliver your cargoes of wheat to the Corn Exchange Elevator." This is simply saying, deposit the wheat in the warehouse known as the "Corn Exchange Elevator." It was naming the warehouse at which the property was to be delivered. But the orders of the cashier went still further. They not only named the elevator in which to store the grain, but to preclude any possibility of their being construed as a delivery to A. F. Smith & Co. for any other purpose than for storage, or to hold as warehousemen, the wheat was to be delivered at that warehouse, "for the account of W. G. Fitch, cashier, subject to the order of the Merchant's Bank." What other, or different language could the plaintiff, or its agent, use to express a simple storage of the grain? No language could have expressed more definitely, distinctly, or specifically, the intention of the cashier to merely order the wheat deposited in that warehouse.

Is not the receipt of the cargoes under and by virtue of the letters and orders as conclusive in favor of the title being in W. G. Fitch, cashier, as if the wheat had been delivered on board of vessels owned by A. F. Smith & Co., and bills of lading had been issued stating that the property was consigned to W. G. Fitch, cashier? It is clear in case of such a shipment that the title would, *by the terms of the bill of lading*, be good in Fitch. It certainly can make no difference, in giving a construction to language, that it is found in one instance in a bill of lading, and in another in a letter or warehouse receipt. The language used is to be understood in its obviously plain meaning.

It is well settled law, that a delivery of property on board

of the vendee's own vessel, and the taking of a bill of lading by the vendor, making the property therein mentioned deliverable to him or his order, will enable the vendor to hold the title to the property, as against all parties claiming adversely to him. Is there, or can there be, any difference between a delivery on board of a vessel under such a bill of lading, and a delivery into a warehouse owned by the vendee, and a receipt or other writing given, stating that the property so received is held for the account and subject to the order of the vendor? Are not the two cases parallel? Can it, with any show of reason, be affirmed that a delivery of property on board the vendee's own vessel, and a bill of lading given, making the property deliverable to the vendor or his order, will enable the vendor, as against the vendee or his assigns, to retain his title to the property, and that a delivery of the same property into the warehouse of the vendee for safe keeping or storage only, and subject to the order of the vendor, will not? In other words, and to bring the question to this particular case, will a delivery of the cargoes of the Kate Kelly, Grenada and Corsican, into the Corn Exchange Elevator, (of which A. F. Smith & Co. are the proprietors,) for the account, and subject to the order of W. G. Fitch, cashier, pass the title to A. F. Smith & Co., when the title would not pass if they owned the said named vessels, and the wheat had been delivered on board said vessels, and a bill of lading given, for the account and subject to the order of W. G. Fitch, cashier? To our minds there is no good reason for any such distinction. If the vendor of goods can hold title to them, when delivered on board the vendee's own ship, by taking a bill of lading making the goods deliverable to his own order, then it must follow that the vendor may, with the consent of the vendee, deposit the goods in the warehouse of his vendee, and retain his title, *by depositing them subject to his own order;* and the acceptance of the goods, by the vendee, subject to the terms of the order, will be conclusive evidence in favor of the vendor's title.

If this argument is sound, then it is clear that the cargoes of the Kate Kelly, Grenada and Corsican, were received by A. F. Smith & Co. into their warehouse for storage, and to be held subject to the payment of the drafts drawn against them, and until the further order of the Merchant's Bank.

The entry on the books of the elevator that the wheat was for the account of A. F. Smith & Co. was without authority from the Merchant's Bank, and could not, of itself, transfer the title of the wheat to A. F. Smith & Co. It would be easy for any warehousemen to acquire, title to property, left with him for storage, if the mere entering of it on his own books, in his own name, without the consent of the owner, would, in law, pass the title.

The fact that A. F. Smith & Co. did not send a warehouse receipt to the Merchant's Bank, is no evidence of authority in them to ship the wheat, or that they did not receive it as the property of W. G. Fitch, cashier. The receipt, on the back of the captains bills of lading, was an acknowledgment that the wheat was received for the account of W. G. Fitch, cashier, as they declared upon their face that the property mentioned in them was for the account of W. G. Fitch, cashier; and, taken in connection with the letters and orders from the cashier of the Merchant's Bank, the contents of which were known to A. F. Smith & Co. before they receipted for the cargoes, was, in the law, as complete and perfect a receipt as if it had been written on the back of the letters or the orders, or as if they had filled out a receipt and signed it, reciting in terms, that they had received the wheat, subject to the terms and conditions specified in the letters and orders.

This argument conclusively shows that the wheat, when in the Corn Exchange Elevator, was as much the property of the Milwaukee Bank, as when afloat on board the schooners Kate Kelly, Grenada and Corsican; and A. F. Smith & Co., had no more right, or authority, to sell, ship, or otherwise dispose of it, than they would have had if, after paying the sight drafts, and accepting the time drafts, they had, without the knowledge or consent of the Milwaukee Bank, or its agent, the Merchant's Bank sought out the captains, and induced them to discharge their cargoes into the Corn Exchange Elevator, and then have shipped the wheat out of the elevator into canal boats and consigned the same to Messrs. Dows & Co. And this brings us to consider, whether or not Messrs. Dows & Co. acquired any title to the wheat in question as against the National Exchange Bank of Milwaukee. The question must be considered in two aspects:

1*st.* Under the so-called factor's act of the State of New York.

2*nd.* By the rules of the common law.

V.

First.---Messrs. Dows & Co. acquired no title to the wheat in question, under or by virtue of any provision of the act of the State of New York, entitled an act for the amendment of the law relative to principals and factors or agents.

There are but two sections of the so-called factor's act, under which the defendants can claim to hold the wheat in question, as against the Milwaukee Bank; they are the first and third. The first section reads as follows:

"Sec. 1. After this act shall take effect, every person in whose name any merchandize shall be shipped, shall be deemed the true owner thereof, so far as to entitle the consignee of such merchandize to a lien thereon.

"1*st.* For any money advanced, or negotiable security given by such consignee to or for the use of the person in whose name such shipment shall have been made; and

"2*nd.* For any money or negotiable security received by the person in whose name such shipment shall have been made to or for the use of such consignee."

The general words of this section have been frequently decided by the New York Courts, to mean shipments made *by the owner or by his authority.* It was claimed, at one time, that the mere existence of a bill of lading, no matter how obtained, would, by virtue of this section, give a consignee a lien for his advances. That the legislature of the State of New York did not intend by this section to deprive the true owner of property of his title thereto, when taken from him by a tortious act, or by a thief, will be seen if we consider the evil, or the supposed evil, it was intended to remedy. This law was enacted for the purpose of doing away in the State of New York, with what was deemed the "harsh and unjust" rule of the common law, which invalida-

ted all pledges by factors of the goods or property of their principals.

The Courts had repeatedly held that a factor or agent, having *only authority to sell*, could not *pledge* the property so as to enable the consignee, who advanced money to the factor or agent, to hold the same as security for such advance. "A factor or agent," it was said by the Court, "who has power to sell the produce of his principal has no power to affect the property by tortiously pledging it as a security or satisfaction for a debt of his own, and it is of no consequence that the pledgee is ignorant of the factor's not being the owner." (*Warner vs. Martin* 11 Howard (U. S.) 224.)

The law was passed on the petition of sundry merchants, and others, in the city of New York, representing that this rule of the common law, which held invalid pledges of property, made under such circumstances, was "unjust and impolitic;" and was intended to protect parties who made advances to factors or agents in ignorance of the true nature of the consignment. The title of the act is itself suggestive of the object of the law: "*Relative to Principals and Factors or Agents.*" These are expressive words, and indicate a relation existing between an owner of property and one *who has been appointed by the owner to sell or dispose of it*, and suggests the idea that the law was enacted for the purpose of regulating transactions between parties in which the relation of principal and agent or principal and factor existed.

This statement of the origin as well as purpose of the law, is, of itself, sufficient to warrant the conclusion that the legislature could not have intended by the words, "every person in whose name merchandise shall be shipped," that a person taking the property as a trespasser, or thief, and shipping it in his own name should thereby be deemed the true owner, so as to give his consignee a lien for advances *bona fide* made. The purpose for which the law was enacted, is answered by construing those words of the law to apply only to cases where the goods have been shipped *by the owner, or under his authority, in the name of another.*

In *Colvill vs. Hill*, 4th Denio 329, the question was discussed. *Bronson*, Chief Justice, in commenting on this section, uses this language:—"Although the words of the sec-

tion are very broad, it must, I think, be confined to cases where the goods have been shipped by the owner, or under his authority, in the name of another. It could not have been the intention of the legislature that one who had taken the property as a trespasser or a thief, and shipped it in his own name, should be deemed the true owner so as to give the consignee a lien for advances. The leading object of the statute was to protect the consignee when he had, in good faith, paid or become liable to pay money *on the credit of appearances created by the owner of the property.*"

Dow vs. Perrin, 16 N. Y.. 325.
Bonito vs. Mosquera, 2 Bosworth, 452–465.
Stevens vs. Wilson, 6th Hill, 512.
" " 3d Denio, 472.
Colvill vs. Hill, 2d Selden, 374.

The first section, correctly interpreted, means whenever *the owner* of goods ships or authorizes the shipment *in the name* of any party, the person in whose name the goods are thus shipped shall be deemed the true owner thereof so far as to protect bona fide advances made " to or for the use of the person in whose name such shipment shall have been made." This corrects the supposed evil which the legislature was invoked to remedy. It protects the party who advances on property *which has been shipped by the owner in the name of another.* This section, in effect, says to the owner of property, " if you ship or authorize the shipment of your property in the name of a third party, and thus by your own act, clothe that party, by the bill of lading, or 'muniment of title,' with apparent ownership, and by so doing enable such party to obtain advances thereon for himself, you shall be deemed thereby to invest said party with the title thereto to the extent that the person making bona fide advances thereon, shall hold the property, as against you, for the amount thereof." The words " in whose name any merchandise shall be shipped," must therefore be construed, to mean " shipped by the owner, or under his authority, in the name of another."

In *Warner vs. Martin*, 11th Howard, (U. S.) 209, it appeared that Martin & Franklin, being owners of a quantity of tobacco, shipped the same to one Esenwein, a commission

merchant in New York City. Esenwein, on the arrival of the tobacco, took it in charge. He failed in business, and went to Europe, leaving his business with his clerk. Warner, a creditor of Esenwein, obtained from the clerk a large quantity of the tobacco which had been consigned by Martin & Franklin to Esenwein. Warner, having thus obtained possession of the tobacco, sold a portion of it to the firm of Heald, Woodward & Co. Martin & Franklin brought a suit to recover the value of the tobacco, and judgment was rendered in their favor.

Justice WAYNE, who delivered the opinion of the Court, says, on page 222, "the exact questions raised by the record are, whether or not the transfer of the tobacco to Warner divested the plaintiff's ownership of it; and whether or not Warner's sale of a part of it to Heald, Woodward & Co., for a full consideration, without any knowledge upon their part of the plaintiff's interest, when they bought from Warner, gave to them a property in it."

He proceeds to discuss these questions, and arrives at the conclusion that the clerk of Esenwein was not authorized to transfer the tobacco to Warner. On page 224, he says: "In this case there was a transfer to Warner by a clerk of their factor." * * * "It must be admitted that such a transfer passed no property in the thing transferred, and that it may be reclaimed by the owner as well from any person to whom it has been sold by the first buyer as from himself. It is the case of property, tortiously taken from the owner, or his agent, without any fault of the owner, and as such, cannot take away his right to it." On page 227, he says:—"By the common law, the transfer of the plaintiff's tobacco to Warner, cannot be maintained. He is responsible to them for the value of so much of it as was not transferred by him to Heald, Woodward & Co. Heald, Woodward & Co. are responsible for so much of it as Warner transferred to them, because Warner, having no property in it, could not convey any to them;"—and still further, on page 228, he declares that "the application of these principles of the common law to these parties, if it needed confirmation, would receive it from the statute of New York of April 1830, for the amendment of the law relative to principals and factors or agents."

This case seems to be a clear intimation of the Supreme Court of the United States in favor of the position we are seeking to maintain, to-wit: that the general words of the act must be so interpreted as to mean only shipments *made by the owner, or by his authority, in the name of another.* The clerk of Esenwein, without authority from the owner of the tobacco, had transferred it. And although Heald, Woodward & Co., were bona fide purchasers of the tobacco, without notice of any claim of Martin & Franklin to it, they were, in effect, declared not protected by the factor's act, because their immediate vendor had obtained the tobacco from one who without any fault of Martin & Franklin, the owners, had tortiously taken it from them.

Freeman vs. Buckingham, 18 How., 191.
Warner vs. Martin, 11 How., 209.
Dean vs. Shipper, 35 Penn., 539.
Mechanic's Bank vs. N. & N. N. H. R. Co., 3d Kernan, 628.
Bower vs. Peabody, 3d do 121.
Kingsford vs. Merry, 1st Hurl. Norm., 503.
Blossom vs. Champion, 37 Barb. 554.
Hardman vs. Booth, 1st Hurlstone & Coltman, 802.
Jackson vs. Hale, 14 How., 525.

It is clear that Messrs. Dows & Co. cannot claim the title to this wheat under the first section. The Milwaukee Bank, and no one by its authority, ever authorized A. F. Smith & Co. to ship the wheat. The act of A. F. Smith & Co., in shipping the wheat out of the warehouse, was a trespass, if not a felony. The wheat was not shipped in the name of A. F. Smith & Co., *by the owner, or by the authority of the owner.* Smith & Co. held the wheat merely as warehousemen. In that capacity they had no power to sell, transfer, or dispose of it; they had no control over its disposition. The wheat was no more the property of A. F. Smith & Co., after it was deposited in the "Corn Exchange Elevator," than when in the hold of the lake vessel. The bills of lading, upon the faith of which Messrs. Dows & Co. made their advances, were issued without the knowledge or consent of the true owner of the wheat.

2nd. The defendants acquired no title to the wheat, under or by virtue of the third section of the law.

That section reads as follows:

"Every factor, or other agent, entrusted with the possession of any bill of lading, custom house permit, or warehouse keeper's receipt for the delivery of any such merchandize, and every such factor or agent not having the documentary evidence of title, who shall be entrusted with the possession of any merchandize for the purpose of sale, or as security for any advances to be made or obtained thereon, shall be deemed to be the true owner thereof so far as to give validity to any contract made by such agent with any other person for the sale or disposition of the whole or any part of any such merchandize for any money advanced, or negotiable instrument or other obligation in writing given by such other person upon the faith thereof."

This section clearly contemplates the relation of principal and agent. Its language is "every factor or other agent." There must then be either a "factor" or "agent." It is clear that A. F. Smith & Co. were not "factors" of the Milwaukee Bank; and we think it is equally clear that they were not "agents" within the meaning of that term as used in this section.

In *Heyman vs. Flewker*, 106 Eng. Com. Law, page 527, it is said "that the term 'agent' does not include a mere servant, or care taker, or one who has possession of goods for carriage, safe custody, or otherwise, as an independent contracting party, but only persons whose employment corresponded to that of some known kind of commercial class (Factors) from which the act has taken its name."

In *Lamb vs. Attleborough*, 101 Eng. Com. Law, a wine merchant gave his clerk authority to sign delivery orders in his master's name, and receive dock warrants in his name, which the clerk was authorized to pledge for the purpose of his master's business. The clerk fraudulently deposited some dock warrants with a pawn broker as security for money bona fide lent him. The clerk was held not to be an "agent" within the meaning of the factor's act, 6 Geo. 4, chap. 94, and 5 and 6 Vict. chap. 39. The merchant recovered the warrants from the pawn broker. "The relation between the

parties here," says the Court, "was that of master and servant, not principal and agent."

In *Monk vs. Whittenburg*, 22 Eng. Com. Law. 22, a wharfinger, having received flour in that capacity, without any authority to sell, disposed of it to a purchaser who *had no notice of a want of authority in the wharfinger to dispose of the same*. The wharfinger was in the habit of doing the business of a flour factor. It was held that he was not "an agent" within the meaning of 6 Geo. 4 chap. 94, sec. 4. Lord Tenterden said:—"It is difficult to say precisely what is meant in this section by an 'agent entrusted with goods;' but we are clearly of opinion that *a wharfinger is not such a person*. If a wharfinger were so considered it would be impossible to say that a carter, *a warehouseman*, or a packer may not, and although it is true that Crane transacted business as a factor with some persons, we do not think that can avail the plaintiff in this case."

In *Wood vs. Rawcliff*, 6 Hare, 191, it was held that the owner of household furniture, leaving the same in a house in the possession of a woman, did not constitute her an "agent" within the meaning of the factor's act of 6 Geo. chap. 4.

In *Zachrisson vs. Ahman*, 2d Sandford, 68, the plaintiff brought replevin for a quantity of cotton. The defendant claimed the same, by reason of having made advances to one Suber, who, it was alleged, was *in possession of the bills of lading of the cotton, and had been entrusted with the same by the plaintiff*. The defendant claimed that having acted in good faith, on the strength of such possession, he was entitled to hold the cotton. The plaintiff insisted that Suber was simply *a clerk, and had wrongfully obtained possession of the bills of lading*. The precise point whether Suber was an "agent," within the meaning of the statute, was therefore, before the Court. Chief Justice OAKLEY, on page 75, speaking of the claim that he was such "agent," says:—"This ground, in our opinion, entirely fails. A clerk is not within the statute at all. Suber was not a factor, in any sense of the word, or an agent for the sale of this property. He had no control at all of the cotton, nor was he entrusted with the possession of the bills of lading in any other manner, than any clerk or porter is entrusted, to whom bills of la-

ding are handed to be carried from a shipper's office to the master, or vice versa."

Van Castell vs. Booker, 2d Welsby, H. and G. 661.
Jenkyns vs. Osborn, 49 Eng. Com. Law, 678.
Florence Sewing Machine Co. vs. Warford, 1st Sweeny, 443.
Fuentis vs. Mentis, 3d Law Rep. Com. Pleas, 268.
" " 4th " " " " 93.
Elliott vs. Bidwell, 51st N. Y., 644.
Wilson vs. Nason, 4 Bosworth, 155.

In the case last cited, the precise question under discussion was involved. Mathews was a warehouseman at Oswego; he received the wheat in controversy in that suit, and deposited it in his own bin, with his own wheat, and that of others. The bill of lading was endorsed, "*Care* of H. Mathews, Oswego." He was employed as an agent, for a commission paid him, simply to superintend and effect the transhipment of the wheat at Oswego, his duty being to pay lake freights and forward the wheat. He shipped the wheat in his own name to the defendant, who paid his money in good faith, believing that Mathews was the owner of the wheat. Mathews was held not to be a "factor," or "agent" "entrusted" *by the owner* with either or any of the documents enumerated in the third section. "The original property and right of the owner," says the Judge, "are not divested; his power to reclaim the goods, or their value, is not lost."

This section of the law, not only requires the relation of factor or agent to exist, but that such factor or agent shall be "entrusted with the possession" of one or the other of the following named documents, to-wit:

1*st.* A bill of lading.

2*nd.* A Custom House permit.

3*rd.* A "warehouse keeper's receipt for the delivery of any such merchandize."

If the factor or agent has neither one of these "documentary evidences" of title, he must be entrusted with the possession of the merchandize "*for the purpose of sale*," or "*as security for any advances to be made or obtained thereon.*"

It is clear that A. F. Smith & Co., the parties who tortiously removed the wheat from the warehouse, and in whose name the wheat was shipped on board the canal boats at Oswego, and who obtained the bills of lading, upon the faith of which Messrs. Dows & Co. made their advances, were, as already demonstrated, neither "factors" or "agents" of the Milwaukee Bank. But if they had stood in either of these relations to that Bank, they could not have given any title to the wheat in question to Messrs. Dows & Co., under or by virtue of this third section, because:

1*st*. They did not hold, from the Milwaukee Bank, or its special agent, the Merchant's Bank, either a "bill of lading," a "Custom House permit," or a "warehouse keeper's receipt." In other words, they were not "intrusted with the possession" of any one of the "documents" mentioned in or required by this section.

2*nd*. They were not "entrusted with the possession" of this wheat by the Milwaukee Bank, or by its authority, "*for the purpose of sale*," nor were they entrusted with said wheat "*as a security for any advances to be made or obtained thereon*." It is evident that Messrs. Dows & Co. have no title to, or claim on the wheat by virtue of any thing in the third section of the act.

Cook vs. Adams, 1st Bosworth, 504.
Bonito vs. Mosquera, 2d Bosworth, 449.
Colvell vs. Hill, 2d Selden, 374.

The order for the delivery of the wheat to the "Corn Exchange Elevator" was for the "account of W. G. Fitch, cashier, subject to the order of the Merchant's Bank." No control of the wheat, by this language, is given to A. F. Smith & Co. The only "agent" selected by the Milwaukee Bank to control the wheat, was the Merchant's Bank, Watertown. The delivery of the wheat to the "Corn Exchange Elevator," under the order given by the Merchant's Bank, was only for the purpose of storing the grain in the warehouse known as "the Corn Exchange Elevator." A. F. Smith & Co., under these orders, could only receive the wheat as warehousemen.

3*rd*. But a conclusive argument against the right of Messrs. Dows & Co. to hold the wheat, as against the Mil-

waukee Bank, is found in the sixth section of the act. That section is in these words:—"Nothing in this act shall authorize a common carrier, *warehouse keeper*, or other persons to whom merchandize or other property may be committed *for transportation, or storage only, to sell or hypothecate the same.*"

If, as already shown, A. F. Smith & Co. had possession of this wheat as warehousemen, the wheat was committed to them for "storage only." No authority was given to them by the Milwaukee Bank, to "sell or hypothecate" the same. The Sixth section is decisive on this point. It removes any doubt which could arise as to the true interpretation of the law. The legislature, by the first section, had used general words, and which, if literally construed, might deprive the owner of his property, although taken from him by an act amounting to a trespass or felony; and, by the third section, had declared a certain class of factors or agents owners of property under certain specified circumstances. To guard against the possibility of the law being so construed *as to include warehousemen*, or common carriers, while acting as such, the Sixth section was enacted, which, in terms, provides that "nothing in the act contained"—no section in the act, no word in the act,—shall authorize a "common carrier," "warehouse keeper," or "other persons," to whom property has been committed "for transportation" or "storage only," to sell or hypothecate the same.

This section has been commented on by judges of the New York courts, in discussing the factor's act. In *Wilson vs. Nason*, 4th Bosworth, 155, Matthews, as agent to receive the grain at Oswego, had placed it in his warehouse, in a bin with wheat of his own and other parties, and obtained bills of lading thereon in his own name, and had transferred them to third parties, who received them in good faith. It was claimed that Matthews was an "agent," "entrusted" by the owner, with the grain, within the meaning of the law. The judge, in his opinion, on page 166, says:—"The Sixth section appears to admit of a construction decisive against the position."

In *Cartwright vs. Wilmerding*, 24 N. Y., 527, Justice GOULD speaks of the Sixth section "as guarding expressly

against a sale by any one who is a mere bailee, (as common carrier, *warehouseman*, or other persons;") and in *Cook vs. Adams*, 1st Bosworth, 504, Justice DUER says of the Sixth section: "It cannot be said that there is any ambiguity here. The evident meaning of the legislature is, that no sale made by a common carrier, *warehouse keeper*, or other persons to whom property is committed for transportation or storage only, shall operate to divest the title of the true owner; in other words, that every such sale, as against the owner, shall be wholly void."

4th. It only remains to consider some cases which may perhaps be cited against us, and to show that they are not analagous, and the first branch of our argument on this point will be answered.

The principal cases which may be cited by the Messrs. Dows & Co., will doubtless be *Pegram vs. Carson* 10th Bosworth 506, *Cartwright vs. Wilmerding*, 24 N. Y. 521, *Dows vs. Green*, 24 N. Y. 638, *Marshall vs. Transportation Company*, vol. 6, No. 3 Abbott's Prac. Reports, *Deshler vs. Rawls*, 3d Keyes, 572.

It is believed that neither of these cases will be found, on examination, to conflict with the views we have advanced upon this law. It may be said, generally, of each and all of them, that there was no claim set up, by the owner of the goods, that he had deposited them in a warehouse, and that the proprietor of such warehouse had, in fraud of his rights, and without his knowledge or consent, shipped the property, taking bills of lading in his own name, and obtained advances on the faith thereof. It will appear, on the contrary, that in each case *the owner, or his properly authorized agent*, had not only delivered to the "factor," or "agent," *the "documentary evidence of title,"* but had clothed him *with full authority to sell;* or had given to *a purchaser bills of sale, and delivered the property, or ordered it delivered, unconditionally, to the purchaser.*

Let us examine the cases:

In *Pegram vs. Carson*, the facts briefly stated, were these:—Pegram, the owner of a quantity of corn, shipped the same to Starling McCulloh & Co., Commission Merchants, N. Y. city, *with instructions to sell*, but not to sacrifice, the corn. He sent a bill of lading to them, addressed "Pegram,

care of Starling McCulloh & Co." On the arrival of the corn, Starling McCulloh & Co., took possession of it, stored it in a warehouse of their own selection, obtained warehouse receipts in their own name, pledged the receipts, and received large advances thereon. Pegram brought suit against the parties who made the advances, to recover from them the possession of the corn, which they had obtained upon the receipts, on the faith of which the advances had been made. Pegram was defeated. The opinion is lengthy, and it would not be profitable to analyse all its points. Suffice it to say, it was held that Starling McCulloh & Co., *with the owner's consent*, had both the "virtual control" of the corn, and the "documentary evidence of such control, right or possession," *with power to sell*. But not so was it with "A. F. Smith & Co." under whom Dows & Co. claim title to the wheat in question. Starling McCulloh & Co., were not the only "entrusted," by the owner of the corn, with the bill of lading, but they were authorized to take possession of, *and sell* the corn. A. F. Smith & Co. held no bill of lading of the wheat from the owner, giving them any control of the wheat, nor were they "entrusted" by the owner of the wheat in question, with any power or control over it, or its disposition. They were mere "care-takers" of the wheat, holding no different relation to it than Matthews did in *Wilson vs. Nason*, or the woman in *Wood vs. Rawcliff*, or Tuthill, in the case of *Cook vs. Adams*, or of the wharfinger, in *Monk vs. Whiltenburg*. The Merchant's Bank was the only agent the plaintiff "entrusted" with the "muniment of title" to the wheat. The Bank made no pledge of the wheat to Dows & Co., nor did it authorize A. F. Smith & Co., to do so, nor did it give any authority to A. F. Smith & Co., to ship the wheat or obtain the canal boat bills of lading.

In *Cartwright et als. vs. Wilmerding et als.*, 24th N. Y., 521, it appeared that the plaintiffs, (Cartwright & Co.,) made several different shipments of hosiery, *consigned to Acker & Harris*, merchants in New York City, and who, two or three years before, had been the agents of Cartwright & Co., *to sell their goods in that city*. Invoices were sent to Acker & Harris, with each consignment of goods. To these invoices affidavits were attached, showing that Cartwright & Co. were the owners of the goods. Acker &

Harris, when they entered the goods at the custom house, left with the collector the invoices thus sent.

Acker & Harris went still further. They took from the warehouse keeper a receipt for the goods in their own name, and obtained from Wilmerding & Co., large advances, pledging to them the receipts, with an indorsement thereon, signed by themselves, in these words, "Deliver to Wilmerding & Monk, or order." On these receipts and orders, Wilmerding & Co. obtained the goods. Cartwright & Co. bring an action against Wilmerding & Co., to recover the goods thus obtained. Cartwright & Co. were defeated. To show that the decision was turned upon the point, that Cartwright & Co. *had clothed Acker & Harris with the "muniments of title,"* and "entrusted" them with the same, *with power to sell the property*, read from the opinion of GOULD, Justice, page 526, as follows:

"To which of the two classes of factors above specified, did Acker & Harris belong? *They had been intrusted with the bill of lading;* and it had performed its office by securing to them an entry at the Custom House—a regular legal Custom House entry, known as a warehouse entry, *by virtue of which* they, and the person who they might authorize, *—and no other*—could, upon paying the duties, take delivery of the goods. Further, according to the custom of trade, they had upon, and as a consequence of such warehousing entry, procured a warehouse keeper's receipt that he held the goods "for their account," practically subject to their order, so far as he was concerned, and by law absolutely at their risk. * * * * * "In brief, the effect of the statute seems to be, that he *who has such documentary evidence of title* as gives him the *exclusive control of the possession*, shall be held the true owner of the property, for certain purposes, PROVIDED *the true owner* has entrusted him with such evidence *for the purpose of disposing of the property.*"

This quotation shows the pivot point of the case. In the case under discussion, A. F. Smith & Co. were never "entrusted," by the plaintiff, or its agent, with a bill of lading, or warehouse receipt, or any "muniment of title;" nor were they entrusted with the possession of the wheat, *to sell or dispose of it, or to obtain advances thereon.* The wheat was consigned to the care of the Merchant's Bank; the bill

of lading and the letter of instructions were sent to that bank; the Merchant's Bank was the only party "entrusted" with the "documentary evidence of title," *and a limited control of the wheat;* the bank did not obtain the advances from Dows & Co.; a trespasser, or one guilty of a greater wrong, without the knowledge or consent of the bank, fraudulently and feloniously shipped and pledged the wheat; a warehouseman, acting (so far as concerned this wheat,) *in that capacity only*, wrongfully, fraudulently, and feloniously pledged the wheat to Messrs. Dows & Co. It is clear that the case of Cartwright & Co. does not militate against, but rather confirms our conclusions.

Dows vs. Green, 24 N. Y., 638, needs only to be stated. Niles & Wheeler, partners, were dealers of produce in Buffalo, and were also engaged in the transportation business with one Caleb. They, as produce merchants, owned a lot of corn. The corn being on board of a lake vessel, one of the partners made a contract to sell it to one Bloss; terms of sale to be cash. Niles & Wheeler agreed to ship the corn, for Bloss, on board of the canal boats owned by them and Caleb, to New York. It turned out that Bloss was not the real purchaser, but that he was acting for one I. T. Mack. In pursuance of the agreement, the wheat was taken out of the lake vessel and put on board the canal boat Neptune. Bloss obtained from one Walker, a clerk of Niles & Wheeler, *a bill of lading which stated that the wheat had been shipped in good order by Niles & Wheeler*, agents, on board the Neptune, "marked and consigned as in the margin, to be delivered as addressed without delay." In the margin was the name of I. F. Mack. *This bill of lading Walker had authority to execute for Niles & Wheeler*, and in fact it was executed by Walker; *with the knowledge and sanction of one of the firm of Niles & Wheeler.* The bill of lading was sent to Mack, who resided at Rochester. He obtained large advances on the faith of it. The Court held, (and rightly so,) *that the bill of lading was put in circulation by the authority of Niles and Wheeler, the owners of the wheat.* The case was directly within the true intent and meaning of the first section of the factor's act. The *goods had been shipped by the owners of the property in the name of Mack.* But in

our case, neither the owner of the wheat, or its agent, gave any order for its shipment from Oswego.

The Milwaukee Bank did not place in the hands of A. F. Smith & Co. a bill of lading, showing that it had shipped the wheat in the name of "A. F. Smith & Co." On the contrary, the shipment by "A. F. Smith & Co." was without the knowledge or consent of the Milwauk e Bank, or its agent. The shipment was a tortious act of a mere bailee of the property.

It is worthy of note that the case of *Dows vs. Perrin*, reported in 16 N. Y., 325, arose out of the same transaction, and it clearly appeared in that case that Walker *had no authority* from Niles & Wheeler, (the owners,) to sign the bill of lading. "It was not executed by Niles & Wheeler, or either of them, personally, nor under their immediate direction, nor by their express authority; but it was prepared and signed in their name by Mr. Walker, as their clerk and agent." And it was held "that there was no contract between Niles & Wheeler for the sale, or for the transportation of the corn, unless it was made by Walker." The point in the case was *the authority of Walker to sign the bill of lading*. After reviewing the evidence, Chief Justice DENIO says:

"The judge should have decided, as matter of law, that Niles & Wheeler were not bound by the bill of lading, and as the plaintiffs deduced their title solely under that instrument, they should have been-non-suited."

The two cases, taken together, confirm and strengthen our view of the law. When it appeared that the property was shipped *without the knowledge or consent of the owners*, the party advancing on the bill of lading, issued *in the name of the owners by a clerk having no authority so to do*, LOST HIS TITLE TO THE WHEAT. But when it was proven that the shipment *was made with the knowledge of the owners*, and the bill of lading executed by the clerk, "with the knowledge and sanction" of one of the owners, a different rule was laid down. The case was then properly held to be within the meaning of the first section of the law. It clearly was a case of shipment *by the owners, in the name of another*, and of bona fide advances to the person in whose name *the owners*

had shipped the property. But the case we present to the Court shows no knowledge or consent of the owners of the wheat to the shipment made by A. F. Smith & Co.

A. F. Smith & Co. received no bill of lading from the Milwaukee Bank or its agent. No wheat was delivered to them by the direction or authority of the Milwaukee Bank or its agent, for shipment, or in pursuance of any contract of sale, or with any power to sell, transfer, or dispose of it.

In *Marshall vs. Transportation Company*, the facts were these: The Transportation Company were common carriers, and had received the wheat to be transported to New York, to Tuttle, Cutting & Co. Tuttle, Cutting & Co. were engaged in the grain trade in New York city. In September 1857 they sold to the firm of Meyer & Ree, through William G. Lord, their broker, a quantity of wheat, then in the canal boat Worthington. The terms of sale were cash on delivery. Tuttle, Cutting & Co. were told by Lord, the broker, to send the canal boat to the ship Great Western. They went so far as to tell some of the agents of the plaintiff that "the wheat was sold, and to send the canal boat, on its arrival, to the ship Great Western."

It was the custom for the buyer to employ the measurer. The measurer took the sample to see if the wheat compared with it. The sale was by sample. The firm of Tuttle, Cutting & Co. received the returns from the measurer on the 12th day of September. On receiving the measurer's return, *a bill of sale was made out, and it, with the "half bill" of the measurer, was delivered to Meyer & Ree*, on the 12th of September. On the 15th of September they received a check of Meyer and Ree, dated on that day, for the full amount due. By the *delivery of the bill of sale, and the measurer's "half bill,"* Meyer & Ree were enabled to obtain a bill of lading from the Captain of the Great Western. They transferred the bill of lading, thus obtained, on the faith of the documents delivered to them by Tuttle, Cutting & Co., to the defendant, Henry Morgan, who made large advances thereon.

It is plain, that in this case, there was a sale of the wheat to Meyer & Ree, the purchasers, *and a complete and unconditional delivery of it to them by the owner or his agent.* The wheat was sent by direction of the authorized agents of the

owners, to the ship Great Western, and delivered on board of that vessel; Meyer & Ree received a bill of sale, and the measurer's "half-bill," from the owners, by which papers they were enabled to obtain from the Great Western "clean bills of lading," reciting that they, (Meyer & Ree,) had shipped the grain on board of the vessel.

The defendant, Morgan, made advances to Meyer & Ree, on the faith of the bills of lading thus obtained, *on the papers furnished by the owners.*

LEONARD, J., in the opinion delivered by him in the Supreme Court, well says:—"A large amount of grain had been delivered by the plaintiffs, or their agents, from a canal boat, on board a vessel at the port of New York, belonging to the defendants, Marshall & Co., or for which they were agents, for the account of Meyer & Ree, as purchasers, to be paid for, cash on delivery; and a measuring officer had been employed, and had measured and screened the grain as it had been put on ship-board from the canal boat. *The measurer had also delivered his bill and the half-bill to the sellers*—for measuring and receiving the grain—stating also the quantity. The sellers, who were the agents of the plaintiffs, soon after receiving the measurer's certificate of quantity, and the "half-bill," *sent them to the purchasers, Meyer & Ree.* These facts are not disputed, and in my opinion they constitute *a voluntary delivery* of the grain, by the plaintiff, through their agents, to the purchasers, although the cash had not been paid."

The difference between that case and the one we are discussing, is very plain. The authorized agents of the plaintiff had sold the grain to Meyer & Ree, on condition that the cash was to be paid on delivery. They had entrusted Meyer & Ree *with a fair bill of sale, and the measurer's half-bill*, and, without receiving payment, *immediately delivered the property to the buyer.* It was clearly the case of a sale of grain for cash on delivery, and a delivery of the same, waiving the payment. But in our case, there was no sale by the cashier of the Milwaukee Bank, or any other person authorized by him, to A. F. Smith & Co., and no delivery of the wheat to them *as buyers.* The wheat was delivered to them as proprietors of a warehouse in the city of Oswego, known as the "Corn Exchange Elevator." It was delivered at that

elevator "for the account of W. G. Fitch, cashier," and subject to the "order of the Merchant's Bank." A. F. Smith & Co. held no paper, of any kind, from the Milwaukee Bank, or its agent, which was evidence of title to the wheat, or of authority to ship the wheat. They held no paper which authorized them to demand or obtain the canal boat bills of lading.

Justice LEONARD, in another part of his opinion, says: "It was not claimed by the plaintiff's that the grain, or the measurer's half-bill, had been obtained from the sellers by any trespass or felonious act, which, *had such fact existed, would have been fatal to the defence.*"

In the case now before the Court, there is no pretence of a sale by the Milwaukee Bank, or its agent, to Smith & Co.; there was no delivery of the wheat to Smith & Co., *as buyers*, or to the canal boats which issued the bills of lading; there was no bill made out and delivered to A. F. Smith & Co. by the Milwaukee Bank, or its agent; there was no check taken by the Bank, or its agent, for the value of the wheat, or in payment thereof; but A. F. Smith & Co., without any documentary evidence of title to the wheat, or any *authority from the real owner*, convert the property to their own use, by shipping it in their name, to Messrs. Dows & Co. Judge LEONARD, in effect says, in the last case which we have cited, that the mere fact that the defendants had made advances to Meyer & Ree, would have been no defence, if Meyer & Ree had not held, *from the owner, the bill of sale, and the half-bill, accompanied by the actual delivery of the wheat.* And even then there would have been no defence, if Meyer & Ree had obtained these fraudulently.

In *Deshler vs. Rawl*, the facts were these: Deshler had corn stored in the Hatch Elevator. A. L. Griffin purchased it, and obtained an order from Deshler for its delivery. Upon that order the corn was delivered to him, and at his request, was shipped into the canal boat L. B. Trowbridge. The order read as follows:

"BUFFALO, September 18th, 1860.

"HATCH ELEVATOR:

"*Deliver A. L. Griffin, Esq., or order*, 4328 47-60 bush-

owners, to the ship Great Western, and delivered on board of that vessel; Meyer & Ree received a bill of sale, and the measurer's "half-bill," from the owners, by which papers they were enabled to obtain from the Great Western "clean bills of lading," reciting that they, (Meyer & Ree,) had shipped the grain on board of the vessel.

The defendant, Morgan, made advances to Meyer & Ree, on the faith of the bills of lading thus obtained, *on the papers furnished by the owners.*

LEONARD, J., in the opinion delivered by him in the Supreme Court, well says:—"A large amount of grain had been delivered by the plaintiffs, or their agents, from a canal boat, on board a vessel at the port of New York, belonging to the defendants, Marshall & Co., or for which they were agents, for the account of Meyer & Ree, as purchasers, to be paid for, cash on delivery; and a measuring officer had been employed, and had measured and screened the grain as it had been put on ship-board from the canal boat. *The measurer had also delivered his bill and the half-bill to the sellers*—for measuring and receiving the grain—stating also the quantity. The sellers, who were the agents of the plaintiffs, soon after receiving the measurer's certificate of quantity, and the "half-bill," *sent them to the purchasers, Meyer & Ree.* These facts are not disputed, and in my opinion they constitute *a voluntary delivery* of the grain, by the plaintiff, through their agents, to the purchasers, although the cash had not been paid."

The difference between that case and the one we are discussing, is very plain. The authorized agents of the plaintiff had sold the grain to Meyer & Ree, on condition that the cash was to be paid on delivery. They had entrusted Meyer & Ree *with a fair bill of sale, and the measurer's half-bill*, and, without receiving payment, *immediately delivered the property to the buyer.* It was clearly the case of a sale of grain for cash on delivery, and a delivery of the same, waiving the payment. But in our case, there was no sale by the cashier of the Milwaukee Bank, or any other person authorized by him, to A. F. Smith & Co., and no delivery of the wheat to them *as buyers.* The wheat was delivered to them as proprietors of a warehouse in the city of Oswego, known as the "Corn Exchange Elevator." It was delivered at that

elevator "for the account of W. G. Fitch, cashier," and subject to the "order of the Merchant's Bank." A. F. Smith & Co. held no paper, of any kind, from the Milwaukee Bank, or its agent, which was evidence of title to the wheat, or of authority to ship the wheat. They held no paper which authorized them to demand or obtain the canal boat bills of lading.

Justice LEONARD, in another part of his opinion, says: "It was not claimed by the plaintiff's that the grain, or the measurer's half-bill, had been obtained from the sellers by any trespass or felonious act, which, *had such fact existed, would have been fatal to the defence.*"

In the case now before the Court, there is no pretence of a sale by the Milwaukee Bank, or its agent, to Smith & Co.; there was no delivery of the wheat to Smith & Co., *as buyers*, or to the canal boats which issued the bills of lading; there was no bill made out and delivered to A. F. Smith & Co. by the Milwaukee Bank, or its agent; there was no check taken by the Bank, or its agent, for the value of the wheat, or in payment thereof; but A. F. Smith & Co., without any documentary evidence of title to the wheat, or any *authority from the real owner*, convert the property to their own use, by shipping it in their name, to Messrs. Dows & Co. Judge LEONARD, in effect says, in the last case which we have cited, that the mere fact that the defendants had made advances to Meyer & Ree, would have been no defence, if Meyer & Ree had not held, *from the owner, the bill of sale, and the half-bill, accompanied by the actual delivery of the wheat.* And even then there would have been no defence, if Meyer & Ree had obtained these fraudulently.

In *Deshler vs. Rawl*, the facts were these: Deshler had corn stored in the Hatch Elevator. A. L. Griffin purchased it, and obtained an order from Deshler for its delivery. Upon that order the corn was delivered to him, and at his request, was shipped into the canal boat L. B. Trowbridge. The order read as follows:

"BUFFALO, September 18th, 1860.

"HATCH ELEVATOR:

"*Deliver A. L. Griffin, Esq., or order*, 4328 47-60 bush-

els white corn, cargo Potomac, subject to my order, until paid for.

JOHN G. DESHLER."

Griffin received from the captain of the canal boat, a bill of lading, reciting that he was the shipper, and annexed thereto drafts drawn by himself on the plaintiff, who accepted, and paid them. While the corn was in transit, Deshler, learning of the shipment, obtained possession of it, and sold it.

The plaintiff, (the party who discounted the drafts drawn by Griffin,) brought an action against Deshler to recover the value of the corn sold by him, claiming the title by virtue of the bill of lading sent to him by Griffin, and the payment of the drafts attached thereto. It was held that Deshler had entrusted Griffin with the possession of the corn, and had given him the *indicia* of title to it, and had thereby enabled Griffin to deal with it as his own.

It is doubtful whether this decision would now be adhered to by the Courts of New York. The case of *Wait vs. Green* so much relied upon in the opinion, has been virtually overruled. (40th N. Y. 314 and 46th N. Y. 500). But admitting that the case was correctly decided it will be observed the order was in terms to deliver "*to Griffin or order*," and it doubtless was these words, in the order, which induced the Court to hold it to be, in the hands of Griffin, "the *indicia* of title." Although it was a special order, addressed to a particular named party, and contained special and limited restrictions, it was nevertheless held to be, as between the parties to the suit, an absolute and unconditional authority given by Deshler to deliver the corn to Griffin. It is difficult to see how the learned Court could have passed over the *special terms and conditions expressed in the order.*

The fact, however, was undisputed that the order was delivered by Deshler to Griffin the buyer, and *upon its face* read "*deliver A. L. Griffin or order.*" But in our case the orders for the delivery of the cargoes, did not name A. F. Smith & Co. Upon their face they declare that the property was to be delivered to the "*Corn Exchange Elevator, for the account of W. G. Fitch, Cashier, subject to the order of the Merchants' Bank.*" These orders were delivered by

A. F. Smith & Co. to the Captains of the lake vessels. The case of *Deshler vs. Rawls* cannot be relied upon as an authority in favor of Messrs. Dows & Co. holding the title to the wheat in question, as against the Milwaukee Bank, for the reasons already assigned, and for the further reason that if the orders had mentioned A. F. Smith & Co., and in terms made the wheat deliverable to them or their order, it would have been an unauthorized act, and beyondthe authority conferred upon the Merchants' Bank, by the Milwaukee Bank.

Had the order of Deshler been delivered to Griffin to hand to the proprietor of the Hatch Elevator, and had it read as follows: "Deliver to the canal boat L. B. Trowbridge, 4328 47-100 bushels of white corn, cargo Potomac, for my account, and subject to my order until paid for, John G. Deshler," and had Griffin, without the knowledge or consent of Deshler, obtained a bill of lading from the captain of the canal boat, reciting that he was the shipper, then it is clear, that the Court would not have held that Griffin obtained the bill of lading by authority of Deshler.

It is evident that the orders of the Merchant's Bank were not intended to authorize the delivery of the wheat to A. F. Smith & Co. The language used expresses no such intent. In Deshler's case, the order was to deliver to Griffin, the vendee.

Messrs. Dows & Co. cannot hold the wheat, as against the true owner, the Milwaukee Bank, by virtue of the so-called factor's act, for the following reasons:

1*st.* The act of A. F. Smith & Co., in shipping the wheat, and taking therefor bills of lading, which recited that they had shipped the same, *was without any authority of the plaintiff, or its agent.* It was a trespass, if not a felony. This law does not divest the title of the owner, when his property has been thus taken from him. It only protects parties advancing in good faith, when *the owner has shipped, or directed the shipment to be made, in the name of another.* The party advancing upon a bill of lading must know that the bill of lading was issued with the consent, or by the authority of the real owner of the property.

2*nd.* A. F. Smith & Co. were not "factors," or "agents," of the Milwaukee Bank, within the true intent and meaning of the statute.

3rd. A. F. Smith & Co. were not "entrusted" by the Milwaukee Bank, or its agent, with a "bill of lading," "Custom House permit," or "warehouse keeper's receipt," for the delivery of the wheat.

4th. A. F. Smith & Co. were not "entrusted" by the Milwaukee Bank, or its agent, with the possession of the wheat, "for the purpose of sale," or as "security for any advances to be made, or obtained thereon."

5th. A. F. Smith & Co. held the wheat, simply as warehousemen, and for storage only.

SECOND.---The Messrs. Daws & Co. acquired no title to the wheat by the rules of the common law.

"The general rule of law, sanctioned by common sense, is, that no man can, by his sale, transfer to another the right of ownership in a thing wherein he, himself, had not the right of property." In *Mitchell vs. Hawley*, 16th Wallace, 550, Justice CLIFFORD says: "No one in general can sell personal property, and convey a valid title to it, unless he is the owner, or lawfully represents the owner. *Nemo dat quod non habet.* Persons, therefore, who buy goods from one not the owner, and who does not lawfully represent the owner, *however innocent they may be, obtain no property whatever in the goods, as no one can convey, in such a case, any better title than he owns*, unless the sale is made in market overt, or under circumstances which show that the seller lawfully represented the owner."

"Possession by a vendee without title, has never been held sufficient to confer a title upon a purchaser from him." 40th N. Y., 316.

In *McNiel vs. the Tenth National Bank*, 46 N. Y., 329, RAPPALLO, J. says: "The *mere possession* of chattels, by *whatever means acquired*, if there be no other evidence of property, *or authority to sell from the true owners*, will not enable the possessor to give a good title."

In *Taylor vs. Pope*, 5th Coldwell, 416, the opinion says: "*Mere possession alone*, does not vest the agent with power *ta give the purchaser, however innocent, the right of proper-*

ty against the owner. Nor is it enough so to do, that the owner put the agent into the possession. Something more must be coupled with such possession to enable the agent to effect a valid sale to the purchaser, against the will or instructions of the owner."

In *McGoldrick vs. Willits*, 52nd N. Y., page 318, PECKHAM, J., says: "Further than this, if Roberts had contracted for the purchase of a horse, to be his only after the price was paid, *and he had taken possession under that contract, title not passing till payment*, IT IS SETTLED *that he could convey no title to a bona fide purchaser, simply because he had no title to convey, and, as a general rule, a man can convey no better title than he has.*"

The authorities are too many to be cited in this brief, affirming the principle that the owner of chattels, or merchandize, cannot be divested of his title thereto without his consent. This principle has been affirmed so often, and in such a variety of cases, that we shall content ourselves with only citing some of the leading ones.

McGoldrick vs. Willits, 52d N. Y., 612.
Wright vs. Ames, 2nd Keyes, 221.
Ballard vs. Burgett, 40 N. Y., 314.
Austin vs. Dye, 46 N. Y., 502.
Fawcett vs. Osborn, 32 Ills., 411.
Linen vs. Cruger, 40 Barbour, 626.
Saltus vs. Everett, 20 Wend. 275.
Spraights vs. Hawley, 39 N. Y., 441.
Cork vs. Beale, 1st Bosworth, 497.
Williams vs. Aberle, 11th Wend., 80.
Evans vs. Wells, 22d Wend., 324.
Andrews vs. Dietrich, 14 " 31.
McMahon vs. Jones, 2d Jones, (Pa.) 229.
Bailey vs. Shaw, 4th Foster, N. H., 297.
Brown vs. Wilmerding, 5th Duer, 225.
Anderson vs. Nichols, 5th Bosworth, 129.
Wooster vs. Sherwood, 25th N. Y., 286.
Warner vs. Martin, 11th Howard, 209.
Leckey vs. McDermott, 8th Serg. & Rawle, 500.
Stanly vs. Gaylord, 1st Cushing, 228.
Hotchkiss vs. Hunt, 49th Maine, 213.
Roland vs. Gundy, 5th Ohio, 127.

Strahan vs. the Union S. T., & T. Co., 43 Ills., 424.
Burton vs. Curyea, 41st Ills., 320.
Hartop vs. Hoore, 2d Strange, 1187.
Taylor et. als. vs. Taylor et als., 5 Coldwell, 413.
Lehigh Co. vs. Field, 8th Serg. & Rawle, 232.

It needs no argument to establish the fact that A. F. Smith & Co. were not authorized by the Milwaukee Bank or its special agent, the Merchants' Bank, to sell or ship this wheat. They were furnished with no *indicia* of title to it. *The original bills of lading never were in their custody or under their control.* They had merely the possession of the wheat as special bailees; they had only the evidence of title which comes by bare possession. The Messrs. Dows & Co. show no paper from A. F. Smith & Co. as evidence of title which came into their possession by any act of the Milwaukee Bank or its agent. The Messrs. Dows & Co. show as their title only canal boat bills of lading naming A. F. Smith & Co. as the shippers. They advanced their money on the faith of bills of lading which were obtained by the fraud or felony of A. F. Smith & Co., and which were issued without the knowledge or consent of the Milwaukee Bank, or its agent.

The "bills of lading" were worthless in the hands of Messrs. Dows & Co. to pass the title to wheat owned by the Milwaukee Bank. If the owner of wheat or produce can lose his title thereto by the mere filling up of blank bills of lading, and the sending of them to New York, by parties not authorized so to do by the owners, then a new rule, unknown to the common law, will be introduced. A bill of lading is only the symbol of the property. It represents the property. If issued by the consent or with the authority of the owner, it passes the title to the property covered by it. But if issued without authority of the owner it passes no title to the property mentioned in it. The cases of *Gurney vs. Brehend* 77, Eng. Com. Law 633, *Decon vs. Shipper*, 35 Penn. 239, *Empire Trans. Co. vs. Steele*, 71st Penn. 190, *Kingsford vs. Merry*, 1st Hurlton & Norman 503, *Brewer vs. Peabody*, 3d Kernan 628, and *Saltus vs. Everett*, 20 Wend 275, are full and ample authorities to the point that a bill of lading only represents the goods and does not have any greater

effect than the transfer of the property. Hence Messrs. Dows & Co., by the rules of the common law, have no other, better or different title to this wheat than they would have obtained had they gone in person to the Corn Exchange Elevator and there made the purchase of the wheat from A. F. Smith & Co. They are chargeable with all that they would have learned or known had the purchase been so made instead of advancing on the bills of lading. In either case *they acquire only the title A. F. Smith & Co. had to the wheat.* Had Messrs. Dows & Co. inquired at the Corn Exchange Elevator, from its proprietors, for the evidence of title to this wheat, what muniment of title could A. F. Smith & Co., have exhibited? A bill of lading? No! A warehouse receipt? No! A bill of sale from the Milwaukee Bank? No! Authority to sell? No! Any power to dispose of any of the cargoes? No! They would have found simply letters from the cashier of the Merchants' Bank, addressed to the "*Proprietors of the Corn Exchange Elevator*," and which letters informed them that enclosed therein were orders for the Captains to deliver their cargoes of wheat to the "*Corn Exchange Elevator for the account of William G. Fitch, Cashier, subject to the order of this bank.*" Are such letters "muniments of title" in the hands of A. F. Smith & Co.? They (Messrs. Dows & Co.), would further have found some of the wheat in numbered bins *in a warehouse*, of which A. F. Smith & Co. were proprietors. *This fact, of itself, would have been sufficient to put them on inquiry.* As warehousemen, A. F. Smith & Co. would, in the usual course of business, be presumed to have wheat in their custody belonging to third parties. The fact that A. F. Smith & Co. were warehousemen, Messrs. Dows & Co. were informed of by *the headings of every letter to them advising of the drafts and the canal boat bills of lading.* "Office of A. F. Smith & Co., Proprietors of the Corn Exchange Elevator, Commission Merchants for the sale of all kinds of State, Western and Canada grain," is the heading of the letters written by A. F. Smith & Co. to Messrs. Dows & Co.

The question of title is therefore brought down to this: The Milwaukee Bank had the legal title to the wheat when it left the City of Milwaukee; it then held "the documentary evidence" of title. It has never parted with that evi-

dence of title, or with its control. The wheat on its arrival was ordered to be delivered into a warehouse, of which A. F. Smith & Co. were the sole lessees and proprietors, for its own account, subject to the order of its agent, until certain described drafts were paid. A. F. Smith & Co. had the manual possession of the wheat—as warehousemen—*and nothing else.* The original bills of lading were not delivered to them; *they were purposely and designedly withheld;* they were clothed with no power, actual, or apparent, to sell or to dispose of the wheat; they had no interest in or title to the wheat, until the drafts were paid. Having, then, merely the manual possession of the wheat, as warehousemen, A. F. Smith & Co. wrongfully and fraudulently, (and probably under the law of the State of New York, *feloniously*) shipped the wheat to Messrs. Dows & Co., sending canal boat bills of lading, reciting that they are the shippers; and Messrs. Dows & Co., trusting and relying upon the honesty and integrity of A. F. Smith & Co., accepted drafts drawn on them, and received the bills of lading as their security! Has the Milwaukee Bank imposed upon them? Has it conferred any power, in any form, on A. F. Smith & Co. to dispose of the wheat, which Messrs. Dows & Co. had any right to rely upon? The facts of this case clearly show that Messrs. Dows & Co. were not deceived or misled by any representation or act of the Milwaukee Bank, or its authorized agent. Their dealings were solely with A. F. Smith & Co., and upon "documents" which they alone issued. Their title must stand or fall upon "the faith and credit" *they had a legal right to give to such papers as evidence of the title of A. F. Smith & Co. to the wheat.* They were bound to know that the bills of lading, upon which they advanced their money, were genuine. They were as much bound to know that the wheat covered by those bills of lading was the property of A. F. Smith & Co. The evidence does not show that Messrs. Dows & Co. took any steps to ascertain anything about the title of the wheat. Under these circumstances, has the Milwaukee Bank lost its title? It certainly never authorized the shipment, or the issuing of the bills of lading. It seems to us that the learned Circuit Judge, correctly decided that "the Milwaukee Bank retained the interest in the wheat which was secured to it by

the transactions between itself and Wm. P. McLaren & Co., and that it was not lost by its going under the advices of the Merchant's Bank into the Corn Exchange Elevator at Oswego, and that upon these facts a subsequent shipment by A. F. Smith & Co., without the knowledge or consent of the Milwaukee Bank, or its agent, the Merchant's Bank at Watertown, did not divest the plaintiff's title, and did not confer upon their consignee in New York, (Messrs. Dows & Co.) an interest in the wheat adverse to the plaintiffs."

VI.

Messrs. Dows & Co. have no lien upon the wheat for money paid by them for its transportation from Oswego to New York City.

The Messrs. Dows & Co. cannot ask to have deducted from the value of the wheat the costs, charges and expenses paid by them for its transportation from Oswego to New York. It is now well settled law that a *common carrier* can acquire no lien for the transportation of property which came into his hands *without the consent of the owner.*

The first case in which this question arose in this country, was *Van Buskirk vs. Purington*, 2d Hall, 561. In that case, the property was sold upon a condition; the buyer failed to comply with the condition, but shipped the goods on board the vessel of the defendants. The owner claimed the goods, demanded them, and on defendant's refusal to deliver them, brought trover for their value. The defendants insisted on their right of lien for the freight. The opinion, on page 568, says:—"The sale and delivery being thus conditional, it is well settled that the property never passed out of the plaintiff until the condition was performed. (13 J. 434—6 J. C. R., 437.) It is immaterial, therefore, to consider what may have been the rights of the defendant to retain property put on board by Robinson and Chandler under the charter party. It is quite clear that they *had no such right, as against the plaintiff, who never intended that his property should go on board the ship at all unless he received payment for it.*"

A like result was reached in the case of *Collman et als. vs. Collins*, page 569 of the same report,—and which arose out of the same transaction.

These decisions were followed in *Fitch vs. Newberry*, 1st Douglass, (Mich.) 1. The opinion of this case is a full discussion of the question, and cites many cases. On page 12 is this language:—"In *Lemprier vs. Pasley*, 2d T. R., 485, it was held that goods *wrongfully* delivered to the person who claimed them *who paid freight and other charges could not be detained for those expenses against the rightful owner*. In 2d Kent, Com. 638, it is laid down that possession is necessary to create the lien, but though there be possession of goods *a lien cannot be acquired when the party came to that possession wrongfully*. So if the party came to the possession of the goods *without due authority, he cannot set up a lien against the owner*." The lien which the defendant's claimed for freight paid and the costs and expenses of storage of the goods, was held invalid, because unauthorized.

In *Robinson vs. Baker*, 5 Cushing, 137, the case of *Fitch vs. Newberry*, was affirmed. "The general principle settled, says the Court, on page 143, "was, that if a common carrier obtain possession of goods wrongfully, or without the consent of the owner, express or implied, and on demand refuse to deliver them to the owner, such owner may bring replevin for the goods, or trover for their value. The case appears to be very fully considered, and the decision is supported by strong reasoning, and a very elaborate examination of authorities." The lien set up in this case was disallowed as unauthorized by the owner of the property.

In *Clark vs. Lowell & L. R. R. Co.*, 9th Gray, 232, the defendant claimed a lien for the transportation of a quantity of lumber. The plaintiff insisted that the lumber had been taken without his authority or consent. The Court say: "This case must be governed by the decision in *Robinson vs. Baker*, 5th Cush., 137. The jury have found that Adams had no authority, either expressed or implied, to forward the lumber by the defendant's line of transportation. In placing the property on board the boat by which it was carried and delivered to the defendants, *he acted without authority, and was a tort feasor. He could therefore confer no*

right on the defendants to hold the lumber by virtue of any lien for its carriage. The right of property and possession was in the plaintiff, and he can well maintain replevin to recover the property."

In *Stevens vs. B. & W. R. Co.*, 8th Gray, 262, a question arose as to the lien of the defendants. "The right," says the Court, "depends on the question whether they rightfully paid the freight to a party entitled to it. *Robinson vs. Baker*, 5th Cush., 137. If the freight would not be due to the subsequent carrier, it would not be due to the previous carrier, and therefore the subsequent carrier could not acquire any lien by claiming under a previous one. Then it was said that the carriage, by whomsoever rendered, was beneficial to the plaintiff as far as Albany; because by either bill of lading the property was intended to be carried by the same conveyance to that point. But the defendant's title depends on the title of their employers. *Non constat, that the injury did not exceed the benefit.* The true reason why the defendants have no lien is *that those who undertook to ship had no authority to ship, and therefore no authority to create a lien on the goods.*"

In *Guilford vs. Smith* 30 Vermont page 74, the Court, in its opinion, says: "Though we should be glad to have Gooderham, Howland & Co. indemnified against the bond given to secure the payment of the duties, and also for the charges paid Stark, Hill & Co., yet being *wrong-doers in taking the property they could acquire no lien upon it, and the assignees of the vendees were entitled to replevy the property without tendering or paying to Gooderham, Howard & Co. the charges paid by them and the duties which their bond obligated them to pay.*" * * * "*they clearly could not set up a lien to defeat this action.*"

In *The Anne* 1st Mason 512 a pilot sought to enforce a lien for his service in bringing a vessel into port, at the request of parties who had taken the vessel without the consent of the owner. "It cannot be maintained," says the Court," upon any acknowledged principles of law that mere wrong-doers or usurpers of the command of the ship, *not acknowledged or appointed by the owner, can create a lien on the ship or personally bind the owner by a contract which*

they may choose to make, whether it be beneficial to him or not."

These quotations are sufficient to show that Messrs. Dows & Co. acquired no lien upon the wheat of the Milwaukee Bank for the money they paid for freight and charges on it from Oswego to New York city. The wheat was consigned by its owner to Oswego. No authority was given for its shipment to New York. Every party who had anything to do with the shipment of the wheat from Oswego, or its transportation to New York city, were *tort-feasors—tresspassers.* The Milwaukee Bank was at liberty to take the wheat wherever found, free from any liens or alleged liens put upon it by the wrong-doers.

But Messrs. Dows & Co. before they paid the most of the freight money, knew that the wheat belonged to the Milwaukee Bank. A telegram was sent to Messrs. Dows & Co., from Oswego, on the 22d day of October, and was received by them on that day, in which they were fully advised that the wheat in the canal boats Four Sisters, B. Hagaman, Anna Rebecca and George Ames, was the property of the Milwaukee Bank. The "Four Sisters" arrived in New York on the 9th of October; the other boats did not arrive until after this telegram was received. As to the boats that arrived after the receipt of the telegram, it is clear that Messrs. Dows have no right to claim a lien for money paid for freight. The cargo of the "Four Sisters" was worth more at Oswego on the day of its shipment, and for some time after, than it sold for in New York city! To charge the owner for freight on this cargo from Oswego to New York, would be to make him bear a loss on account of the acts of trespassers or tort-*feasors.*

The Circuit Judge correctly, ruled that the Messrs. Dows & Co. could not charge the Milwaukee Bank with the "costs, expenses and charges," on this wheat, occasioned by its shipment without the consent of the owners from Oswego. We believe there is no conflict of authority on this question. The owner ought not to be compelled to pay charges incurred, without his consent or authority.

VII.

A. F. Smith & Co. have no lien or claim on the wheat for the freight money paid by them on the cargoes from Milwaukee to Oswego, or for the money paid on the sight drafts.

In *Cragin vs. Coe*, 29th Conn., page 53, ELLSWORTH J., says:—"The fact, so much dwelt upon by the defendant's counsel, that part of the purchase money was paid down, and the balance agreed to be paid thereafter, can make no possible difference. The credit was made to depend on the security, and that was carefully retained by the plaintiff."

In *Brown vs. Haynes*, 52d Maine, 581, APPLETON C. J., says:—"If the plaintiff had recovered possession of the oxen for non-performance of the condition of their sales, he would have been under no legal obligations to repay the sums received in part payment. The purchaser *failing to perform his agreement derives no benefit from a partial performance of his contract, nor can he confer any by reason thereof.* The same principles are applicable as in case of a bond for the sale of real estate, where there is no compliance on the part of the purchaser with the terms of the sale, and the seller resumes possession on account of such non-compliance." And on page 583 he says: "If a mortgager of personal property, after a foreclosure, brings trover for the value of the property mortgaged, he recovers in damages its whole value. The mortgagor is never allowed to claim deductions for part payment. So when there is a conditional sale, the purchaser gains no right by a partial performance of his contract."

In *Harnsbraugh vs. Peck* 5th Wallace page 506, the purchaser of real estate under a written contract to purchase had paid of $93,000 (the amount he was to pay for the land), $10,000, and interest, in addition to the amount, of $28,000, and also expended in improvements $18,000, making a total of $56,000. There was due on the contract $83,000 of principal, and $20,000 of interest at the time the vendors re-took

possession of the land in accordance with the terms of the contract, for non-performance by the vendee. The vendee was not allowed to set off the payments made or the amount paid for improvements.

But there is a stronger and better reason why A. F. Smith & Co. ought not to be allowed anything for their advances of the freight. Whatever lien they had was extinguished by their wrongful, if not felonious shipment of the wheat.

Jarvis vs. Rogers, 15 Mass 376.
Holly vs. Hungerford, 8th Pick 75.
Fielding vs. Kymer, 2d Brod. and Bing 639.

It is clear from these authorities that A. F. Smith & Co. are remediless in the premises, and that Messrs. Dows & Co. cannot claim anything on account of payments made by A. F. Smith & Co. His Honor, the Circuit Judge, allowed the Milwaukee Bank to recover only the value of the wheat up to the amount due on the unpaid time drafts on the particular cargoes.

This was allowing to Messrs. Dows & Co. the benefit of any surplus, and the result was that while they did not realize enough from the sale of those portions of the cargoes of the Kate Kelly and Grenada, received by them, to pay the unpaid time drafts drawn by McLaren & Co., on those cargoes, they had a surplus of $3,295.07, of the proceeds of that portion of the cargo of the Corsican which came into their hands.

VIII.

The measure of damages was the full value of all the wheat that came into the hands of Messrs. Dows & Co., with interest from the date of its conversion.

We make this point only to show that the Circuit Judge gave, as he said, the most favorable rule of damages he could to the defendants. Under the following decisions it would

seem that the Milwaukee Bank was entitled to the $3,295.07 in the hands of Messrs. Dows & Co.

Ewing vs. Blount, 20th Alabama, 694.
Davidson vs. Gunolly, 1st Michigan, 388.
Ullman vs. Barnard, 7th Gray, 558.
Clark vs. Lowell L. R. Co., 9 Gray, 231.
Romain vs. Van Allen, 26 N. Y., 309.
Burt vs. Dutcher, 34 N. Y., 496.
Ballard vs. Burgett, 46 Barbour, 441.
Dows vs. Rush, 28 Barbour, 187.
Young vs. Willett, 8th Bosworth, 486.
Groat vs. Gile, 51st N. Y., 431.
Brown vs. Haynes, 52 Maine, 578.
Angier vs. Taunton Paper Co., 1st Gray, 61.
Edmunndson vs. Nutting, 17 Com. Bench, 280.
Swizer vs. Leach, 18 Com. Bench, 479.
Crain vs. Bailey, 10 Gray, 87.
Adams vs. O'Connor, 100 Mass., 515.
White vs. Webb, 15 Conn., 502.

IX.

The Bill of Exceptions does not purport to contain all of the evidence given on the trial of the cause. We suppose that in this state of the record no errors can be legally assigned in the general charge of the presiding judge to the jury, or in the refusal to give specific instructions asked on behalf of the defendants. The presumption of law is that there was other and sufficient evidence to warrant the charge and the refusal to give specific instructions.

Cutler vs. Hurlbert, 29th Wis., 168, and cases cited.

We have endeavored by our argument to reach the merits of the case, and we see no error in the admission or rejec-

tion of testimony, or in the general charge to the jury, or in the refusal of specific instructions asked on behalf of the defendants.

The entries in the books of the Corn Exchange Elevator, in connection with the testimony of the employees who made them, and the entries in the bin book of the foreman of the Elevator, made in the course of his business, the accuracy of which were testified to by him, were competent evidence to go to the jury to identify the wheat which went into the canal boats Four Sisters, B. Hagaman, Anna Rebecca and George Ames, as portions of the cargoes of the Kate Kelly, Corsican and Grenada.

In *Moots vs. The State*, 21st Ohio State Reports, page 655, an employee of the Pan Handle Railroad Company was permitted to testify that he made entries in a freight book; that the book was a true record; that a particular entry was made in the regular order of business on the date it purported to be entered. This book was then read in evidence by the State, to prove that "on the 10th day of May, 1871, two horses were shipped in the cars from London to Cincinnati." Moots was indicted for stealing the horses, and the proof was offered to identify the shipment. It was alleged as error, that the freight book was not admissible. The Court says: "We are of opinion that the freight book was properly admitted in evidence. The witness made the entries in the book, including the entry of May 10th. *He made the entries truly and in the regular order of business on the day they purport to have been made.* This, in effect is, that the witness on May 10th, truly entered the fact that two horses were then shipped from London to Cincinnati. The entry in the book and the oath of the witness supplement each other. The book was really a part of the oath, and therefore admissible with it in evidence. 1st Greenleaf, Ev., sec. 437, (12th Ed.) and note 3."

In *Briggs vs. Rafferty*, 14th Gray 526, a servant of the Boston and Maine Railroad was permitted to testify that the freight books of the Company produced by him "were in his handwriting, that he had no doubt they were correct, and that the transaction therein recorded took place, but he had no personal recollection of the facts so as to specify them." The books were allowed to go to the jury. The Supreme

Court says: "The introduction of the freight books for the purposes for which they were offered, were competent."

The following cases affirm the same principle:

Insurance Co. vs. Weide, 9 Wallace 678.
do. do. do 14 do 380.
Fennerstein's Champagne, 3d do. 145.
Brackburn vs. Crawfords, 3d do. 175.
M'Caul vs. Le Kamp Ad. 2d Wheaton, 111.
Smith vs. Sanford, 12 Pick, 129.
Sickles vs. Mather, 20 Wendell, 72.
Lewis vs. Ingersoll, 1st Keyes, 347.
Stroud vs. Tilton, 3d do. 139.
Haley vs. Sinnelaugh, 15 N. Y. 485.
Russell vs. H. R. R. Co. 17 do. do. 134.
Guy vs. Mead, 22 do. do. 462.
Heart vs. Hummel, 3d Penn. 414.
Sisson vs. T. B. R. Co., 14 Mich. 489.

X.

This case, although somewhat novel in its leading facts, when carefully examined and clearly analyzed, presents no doubtful or intricate rule of law. It is simply the question whether the Milwaukee Bank, the owner of the wheat at the time it left the port of Milwaukee, can be divested of its title thereto by the shipment of it to Messrs. Dows & Co., by A. F. Smith & Co., without its knowledge or consent. It seems impossible for Messrs. Dows & Co. to contend that the legal title to the wheat was passed to them, and lost to the Milwaukee Bank, by the acts of A. F. Smith & Co. Viewed in any light it can be legally, it must be conceded that Messrs. Dows & Co. made their advances upon the confidence they had that A. F. Smith & Co. held the legal title to the wheat, and which confidence was based upon no paper given by the Milwaukee Bank, or its agent, or by any act or representation of the Bank, or its agent. The canal boat bills of lading were never issued by the authority or with the consent of the owner of the wheat. The mere issuing of the bills of lading by A. F. Smith & Co. would not, of itself, give them title to property owned by third parties. The obligation was laid upon Messrs. Dows & Co. to know

whether the bills of lading were issued by the owner of the wheat.

There seems to be four aspects of the case which conclusively establish that Messrs. Dows & Co. had no legal right to rely exclusively upon the canal boat bills of lading as conclusive evidence of title.

1*st*. The most favorable view that can be legally taken by Messrs. Dows & Co., is, that A. F. Smith & Co. paid the sight drafts, and accepted the time drafts upon condition that tney were to have the title to the wheat when the drafts were paid, and that there was a delivery in accordance with and subject to the terms of the contract. But this view will not aid Messrs. Dows & Co. This makes the transaction an agreement to sell, and not a completed sale, and the possession, if given to A. F. Smith & Co., was as bailees, to hold the wheat subject to the terms and conditions of the agreement. But under the authorities, (including those in New York) such a possession would give A. F. Smith & Co. no title until the drafts were paid. They could not, therefore, invest Messrs. Dows & Co. with a title, although they (Messrs. Dows & Co.) purchased without knowledge of the agreement, or its terms, and in the utmost good faith, and paid a full and adequate consideration, and for the best of all reasons, because A. F. Smith & Co. had no title.

2*d*. But we submit that Messrs. Dows & Co. cannot claim that A. F. Smith & Co. had the possession of this wheat under any contract of purchase, or subject to any conditions that they were to have the title. At the time they made the shipments and obtained the canal boat bills of lading, A. F. Smith & Co. carried on two distinct kinds of business. They were Commission Merchants and Warehousemen. The fact that they acted in this dual capacity was, or might have been well known to Messrs. Dows & Co. This fact, of itself, was enough to raise *a doubt* upon any shipment made by A. F. Smith & Co. How could Messrs. Dows & Co. know, *without inquiry*, but that the very wheat covered by bills of lading issued for or in the name of A. F. Smith & Co., might not be in their possession simply *as warehousemen*. The fact, that from the very *nature of their business it might be so*, made the obligation more imperative to learn the exact title they had to it. When one occupies such a position that he

may stand in a *dual* relation to property, that very condition of things should make third parties dealing with him far more exact and careful to learn the true facts. As factors to sell, and acting only in that relation, there might be some argument in favor of a presumption of authority to sell. But that presumption is removed when the fact is disclosed, or is made apparent, that the factor to sell is also a warehouseman, and receives for storage the same class or kind of property which he offers for sale. Had Messrs. Dows & Co. acted on the fact, which was patent on the face of every letter written to them by A. F. Smith & Co., that they (A. F. Smith & Co.) were "Proprietors of the Corn Exchange Elevator," and asked for the "documents" which gave them a right to ship the wheat into the canal boats, what could A. F. Smith & Co. have produced? The most important "documents,"—*the bills of lading*—were not in their possession or under their control. The only paper showing, or tending to show title in A. F. Smith, would have disclosed the *title in the Milwaukee Bank*, or its cashier. In other words, the only "documentary evidence" of title, A. F. Smith & Co. could have exhibited, would have disclosed to Messrs. Dows & Co. that they had *no control of the wheat;* the letters would have informed Messrs. Dows & Co. that *A. F. Smith & Co. had not even the possession, actual, or in law, of the wheat;* that no right was conferred upon A. F. Smith & Co. to dispose of the wheat in any manner, *and no authority to exercise even ostensible acts of ownership over it.* In short, the "documents" would have informed them that the wheat was in the "Corn Exchange Elevator," subject only *to the control of the special agent of the Milwaukee Bank. The possession, therefore, was that of the Milwaukee Bank, or its agent*, and not that of A. F. Smith & Co.; and this fact could have been easily ascertained had Messrs. Dows & Co. made the inquiry which THE DUAL CHARACTER OF THE BUSINESS of A. F. Smith & Co. might, and ought reasonably to have suggested; and we hold that *by reason of this peculiar character of their business* the Messrs. Dows & Co. were called upon and required to exercise greater care than if they had been dealing with one whose business was only that of a factor to sell. This distinction is clearly brought out and was made in the case of *Hull vs. Walker*,

cited in the 5th Coldwell, page 418. In that case, Hull had deposited his cotton with Goodman & Means, Commission Merchants *and warehousemen*, in Memphis, Tenn., for storage only; they sold it to Walker, who had no notice of Hull's title. Hull brought an action of trover against Walker for the conversion of the cotton, and recovered its full value. The court say: The cotton was placed by Hull with Goodman & Means, *on storage*, and *for that reason* their sale to Walker gave him no title."

In *Wooster vs. Sherwood*, 25th N. Y., 278, the facts were that barley had been left with a brewer to be malted. The brewer sold the barley to a third party. Suit was brought against the purchaser by the true owner. On page 287 the opinion says: "There is nothing to show that either Haight or Camp ever manufactured malt on their own account and sold it in the usual course of trade, except the sale to the defendant; or if they did, that the defendant knew it. But if it had been shown that Haight or Camp sold malt on their own account, the fact of the plaintiff leaving barley at the brewery to be manufactured into malt, would not furnish sufficient *indicia* of the right of the manufacturer to sell. In *both cases* the manufacturer makes his goods, or adds labor to them *for others* as well as on his own account, *and hence the presumption of authority to sell does not arise.*"

The cases of *Hamilton vs. Bell*, 10 Exchequer 544, and *Whitfield vs. Brand*, 16th Meeson and Welsby, 282, clearly and fully recognize the principle that one purchasing from parties whose business is of that character, that they may be either owner or bailee of the property sought to be purchased is under peculiar obligations to learn the true condition of the title.

A. F. Smith & Co. were merely custodians of the wheat. They were not in the position of vendees at all. The possesssion as well as the legal title belonged to the Milwaukee Bank. A. F. Smith & Co. had no more control of the wheat and no more authority over its disposition than if it had been been placed in any other warehouse in Oswego. The fact that the wheat was ordered into the Corn Exchange Elevator gave A. F. Smith & Co. no more control of it than if it had been ordered into the Columbian Elevator. It was to

be held by the Corn Exchange Elevator for the account of W. G. Fitch, *and subject to the order of the Merchant's Bank.*

3rd. The wheat was never delivered to A. F. Smith & Co., (if delivered to them at all,) *for the purpose of sale.* They were clothed with no authority, actual or apparent, to ship the wheat. If they had any possession, it was of the same character, and with no other or different authority over its control or disposition than the captains of the lake vessels had when it was on board their vessels: *they held no bill of lading and no evidence of title to the wheat.* Messrs. Dows & Co. had nothing therefore to rely upon, *as evidence of title,* other than the fact that the wheat was in the Corn Exchange Elevator, of which A. F. Smith & Co. were proprietors: this of itself was not title, or any evidence of title.

4th. The shipment of the wheat by A. F. Smith & Co. was larceny, and for that reason conferred no title upon Messrs. Dows & Co., although they advanced their money innocently and in the utmost good faith.

The opinion of FREEDMAN, J., in the *Florence Sewing Machine Company vs. Warford,* 1st Sweeney's Reports, 442 to 448, is conclusive on this question.

This argument settles the case down to the point suggested in its commencement, to-wit: that the only question is which of the two parties must bear the loss caused by the fraud and felony of A. F. Smith & Co.? It must depend on the question which of them has the *legal title* to the wheat. In the language of Judge SPENCER, in *Palmer vs. Hand,* 13 Johns. 436: "This is a contest between two honest men who shall be the dupe of a swindler. The strict rule of law must therefore be applied." The Messrs. Dows & Co. cannot be allowed to stand in a more favorable situation than they would have been in if the wheat had been in the possession of any other warehousemen in the city of Oswego, and A. F. Smith & Co. had, by falsehood or fraud, procured its shipment, without the knowledge or consent of the Milwaukee Bank, or its agent.

The proof is conclusive that the wheat of the Milwaukee Bank was ordered to be placed in the Corn Exchange Elevator, for the account of William G. Fitch, cashier, subject to the order of the Merchant's Bank; hence the shipment

by A. F. Smith & Co. to Messrs. Dows & Co. *was wholly void*. It was an unauthorized, fraudulent and felonious act. And however innocent Messrs. Dows & Co. may be, it passed no title as against the Milwaukee Bank. It is certain that Messrs. Dows & Co. did not make their advances upon the faith or credit of anything done or said by the Milwaukee Bank, or its agent; the facts show that they trusted the Milwaukee Bank in nothing, relied upon that Bank in nothing; but believed entirely and solely in A. F. Smith & Co., and received the canal boats bills of lading without inquiry. They knew the dual nature and character of the business of A. F. Smith & Co.; they knew that it was possible—nay more highly probable—that large quantities of wheat and other grain might be in the warehouse simply for storage. This fact made the duty far more imperative to inquire. In short, Messrs. Dows & Co. made their advances upon the trust and confidence they had in the honesty and integrity of A. F. Smith & Co. They relied solely upon their representations that the wheat belonged to them. They trusted to appearances rather than to actual facts. Without imputing any design or intention, (as there is no ground for so doing) of any fraud or dishonesty on the part of Messrs. Dows & Co., but assuming, as the Circuit Judge did, that they acted in good faith, and fully believed that the canal boats bills of lading were issued by the true owner of the wheat, and the loss is upon them, and not upon the Milwaukee Bank. Messrs. Dows & Co. were deceived. But the deception was not on account of or by reason of any act done—word said—or writing given by the Milwaukee Bank, *upon the faith of which they made the advances*. Messrs. Dows & Co. are in the same unfortunate position of all the parties in the various cases we have cited, who, trusting too much in the good faith of those with whom they dealt, and relying upon appearances, were duped or victimized by cold and heartless swindlers or felons. They relied too implicitly upon A. F. Smth & Co.

It was asked in the Court below, and may be in this Court, *what remedy* have Messrs. Dows & Co., or parties in New York City, who advance on canal boat bills of lading, if they are required to go behind the bills of lading to ascertain the

title? The answer, and the only answer is, *deal with honest men*. There is certainly no such remedy in the law, as Messrs. Dows & Co. invoke in this case. The true owner of the wheat is not the one "to pocket the loss." *Caveat emptor*, which is said by Judge Peckham, in 52d N. Y. page 619, "to be a healthy rule, that promotes good morals and common honesty" is the rule of the common law. That rule does not enable Messrs. Dows & Co. to take the wheat of the Milwaukee Bank, without its authority and consent, and hold it, simply because they *believed* that A. F. Smith & Co. owned it. Title to property is not changed because of *mere belief* on the part of the buyer, unless the owner has induced the belief by his own act or conduct, and the purchaser has relied upon, and acted on the faith of that act or conduct. We know of no remedy against the vessel or its owner, for one who advances on bills of lading signed by a captain when the property has not been delivered on board of the vessel. The sole remedy is against the captain or the parties who pledged them. We know of no remedy the law gives against a vessel or its owner to one who advances his money on bills of lading that are forged. The only remedy is against the party who pledged them. We know of no remedy the law affords a purchaser of chattels where he obtains them from one who has no title except against his immediate vendor. As the Supreme Court of Illinois well says, in *Burton vs. Curyea*, the "law can punish roguery, but it cannot protect against its multitude forms of devices."

One rule is certainly safe, and may always be acted upon by a buyer. *Mere possession of chattels or merchandise is not conclusive evidence of title*. Whoever purchases or advances his money to one who has or exhibits no other evidence of title than merely its possession, buys at his peril. This rule must be observed by all buyers. Had Messrs. Dows & Co., in this instance, adhered to this rule, they would not have met with this loss. The neglect to inquire was to "take the chances." They took them. *The loss is upon themselves*. The men whom they trusted turned out to be unworthy of confidence. They cannot charge the knavery and rascality of their vendors upon the Milwaukee Bank. They cannot take the wheat of that bank to indem-

nify them for the loss. Neither the Statute Law of the State of New York, or the rules of the Common Law, will authorize or warrant that kind of "set off." The Milwaukee Bank, upon the proofs, has the legal title to the wheat, and it has in no way, by itself or its authorized agent, lost its title. The judgment, if such is the fact, must necessarily be affirmed.

H. M. FINCH,

Of Counsel for Defendant in Error.

Commission of Appeals.

FIRST NATIONAL BANK OF TOLEDO,

Appellant,

vs.

THE NEW YORK GUARANTY AND INDEMNITY COMPANY,

Respondent.

Supreme Court.

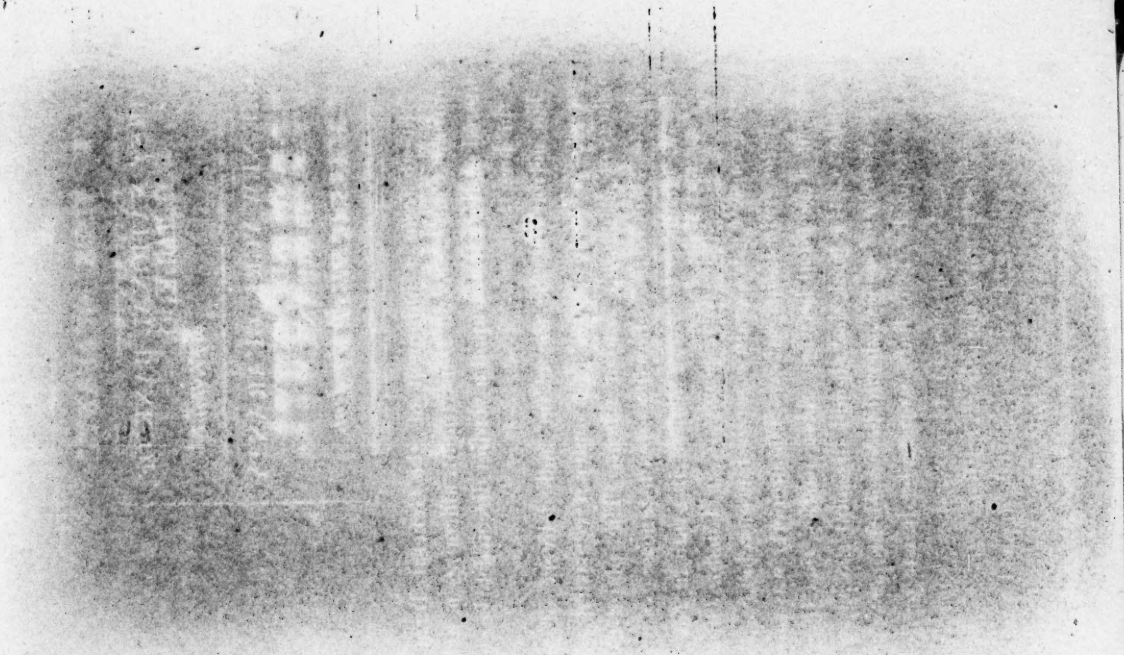
OF MASSACHUSETTS.

FRANCIS E. STOLLENWERCK. and ANOTHER,

vs.

HENRY C. THACHER, and ANOTHER.

Lawrence Miller, Printer.



Commission of Appeals.

FIRST NATIONAL BANK OF TOLEDO,
Appellant,
vs.
THE NEW YORK GUARANTY AND INDEMNITY COMPANY.
Respondent.

Appeal from a judgment of the General Term of the Supreme Court, Second Department, affirming a judgment entered at the Circuit upon a verdict directed to be rendered by the jury.

The action was for the claim and delivery of personal property. The property taken under it consisted of 1,100 bushels of Michigan Amber wheat. The plaintiffs made claim to it under the following circumstances:

T. W. Griffin & Co. were dealers in grain in the city of New York. Their correspondents at Toledo, Ohio, were Carrington & Casby, grain commission merchants, who purchased the grain in litigation. The property was purchased under an agreement between these parties, that Carrington & Casby, or the bank that should discount the paper drawn for the purchase money, should hold such property until the paper was paid. Two drafts were to be drawn for the price —one, at sight, as a margin to cover any depreciation in value during transit; the other, on time.

On September 22d, 1868, Griffin telegraphed to Carring-

ton & Casby to buy a load of amber wheat at their quotation.

The money for this purchase was obtained from the plaintiff, under an agreement that drafts should be drawn on Griffin & Co. for the amount loaned, and that the bill of lading of the wheat should be given in the plaintiff's name as a security for their payment.

The purchase price was $15,945.80. Two drafts were given for this amount. There was a sight-draft for $1,945.80, and another for $14,000, drawn on thirty days time. They were drawn by Carrington & Casby on Griffin & Co. in favor of the plaintiff's cashier.

A bill of lading was given on the shipment of the wheat, December 26th, executed by the carrier. It stated that Carrington & Casby had laden upon the schooner Mazze, bound for Buffalo, the described articles to be delivered unto the consignees or their assigns, as marked and numbered in the margin. As these marks became material in the cause they are set forth.

"Acc't S. S. Hubbard, Cash., 7,700 bushels Amber, care
"of Kidd, Pierce & Co., New York, Mich. wheat. A. L.
"Griffin & Co. Buffalo. C. C. & R. for 25 Cts. per bushel.
" B'k acc't to T. W. Griffin & Co.

JOSEPH SKELCHER."

Evidence was offered at trial under defendant's objection to show the meaning of these expressions. This will be referred to hereafter.

The bill of lading and drafts were accompanied by insurance certificates. All of these documents were delivered on September 26th, by Carrington & Casby to the plaintiff. They were mailed on the 28th to Kidd, Pierce & Co., in New York, with an accompaning letter of advice. This directed the property to be delivered only on payment of the draft of $14,000. The papers reached New York on or

before October 1st. The sight draft was paid, and the time-draft at the same date was presented for acceptance and accepted. It remained in the possession of Kidd, Pierce & Co., together with the bill of lading and insurance certificates.

It is now necessary to follow the movements of the grain to its destination. When the schooner Maize arrived at Buffalo, the cargo was delivered to A. L. Griffin & Co. They shipped it to New York upon the canal boat Hulbert, which was owned by the Eastern Transportation Company. A canal bill of lading was executed by A. L. Griffin & Co. It provided for the transportation of the property to the place of destination, without unnecessary delay, and its delivery to the consignee upon payment of freight and charges. Three days were allowed for unloading, and after that demurrage was to be paid. The bill contained the following clause: "The freight charges and demurrage, payable to Young Bros., or order, at place of destination who is the only party authorized to collect the same, and whose receipt shall be in full of all demands on this cargo or bill of lading." * * * * Acc't S. S. Hubbard. Cash., 7,700 bush. Amber Mich. wheat, ex-schooner Maise, care Kidd, Pierce & Co., New York.

Lake Freight, 5 Cts.	$385 00
Storage, 1¾ Cts.	134 75
B'k acc't to T. W. Griffin & Co., our charges	19 27
Total	$539.02

Freight to New York, 17½ Cts.

A. L. GRIFFIN & CO.,

Terry.

This bill of lading was sent either to T. W. Griffin & Co., or to Young Bros., of New York.

The Hulbert arrived at New York on October 16th. By

the direction of T. W. Griffin, it was unloaded on that day at the warehouse of Shaw & Co., who were warehouse men in Brooklyn. They gave to Griffin & Company, the following warehouse receipt:

BROOKLYN, October 16, 1868.

Received in store No. 92, floor No. 2, sections No. 1, 2, and 4, from Messrs. T. W. Griffin & Co., per boat T. L. Hulbert, seventy-seven hundred 14-60 bushels wheat.

SHAW & CO.

The merchandise covered by this receipt is deliverable only on return hereof, properly endorsed, with all charges paid. New York, Office, No. 5, Water Street."

Griffin & Co., on October 17th, indorsed this receipt, in blank, and delivered it to the "New York Guaranty and Indemnity Company"; that company, on the faith of it, made a loan of $14,000 to Griffin & Co., by whom an agreement was entered into, which set forth that the borrowers had confided to the management, custody and charge of the company (defendant), the wheat in controversy, belonging to them (Griffin & Co.), on which had been advanced $14,000, and that they promised to refund such advance, with interest, within thirty days, and that the company were to have a lien, prior to all other claims, upon the property or its proceeds, to secure the advances, charges and commissions. There was also an authority to sell the property in case default was made in payment.

It did not appear that either Shaw & Co. or the Guaranty and Indemnity Co. knew any thing of the relations of Griffin & Co. to the property. Shaw & Co. gave the warehouse receipt to Griffin & Co., because that firm sent the boat there. It was their custom to give warehouse receipts to any one who sent boats to them. The Guaranty Company made the advance simply on the production of the warehouse receipt without asking questions. This was their usual custom where they had no reason for suspicion.

The Draft for $14,000 matured October 29th. It was then presented by Kidd, Pierce & Co., for payment, with the original bill of lading attached. Payment was refused, and the draft protested. Griffin & Co. were at the time insolvent.

No notice had been given to Kidd, Pierce & Co., of the arrival of the grain, and they were ignorant of its situation. The bank, after the protest, traced through other sources, the grain to the warehouse of Shaw & Co. On October 31st. 1868, while the indebtedness to it still remained unpaid, it commenced this action, both against Shaw & Company and the Guaranty Company, to obtain possession. The grain was taken from the possession of Shaw & Co., without making any demand from the Guaranty Company.

The defendants claimed at the trial that there was ambiguity in the expressions used in the canal bill of lading, tending to mislead, and which did in fact mislead Young Bros., and induced them to give the possession of the wheat to Griffin and Co. Carrington & Casby and other witnesses familiar with the business of transporting grain between Toledo and New York, testified that the papers used were commonly employed in such transportation, where the property was pledged to a bank, They explained, under objection, the terms used, as follows: In the original bill of lading from Toledo, the entry, 'Acc't S. S. Hubbard, Cash,' means that the property is to be transported for account of the bank of which S. S. Hubbard is Cashier. 'Care Kidd, Pierce & Co., New York,' means that the grain is to be shipped to them for account of the plaintiff, and that they are to hold the same for account and subject to the order of the bank. The entry 'A. L. Griffin & Co., Buffalo,' means that the property goes through them as forwarders, at Buffalo. The phrase, 'B'k acc't to T. W. Griffin & Co.,' means that the bank derives its title by virtue of some transaction

in which T. W. Griffin & Co. are interested. The same general explanation was given of corresponding entries on the canal bill of lading.

The explanation given by the plaintiff's cashier was in these words: "The first entry shows the name of the cashier of the bank holding the property in pledge; the second entry shows the correspondent of said bank, who is to receive the property at the point to which it is shipped; the third entry shows the forwarder at Buffalo, who is to attend to the trans-shipment at that point; and the fourth entry shows the party who is to pay the debt for which the property is pledged, and after such payment to receive the property from the bank's correspondent."

Evidence was offered at the trial tending to show that the parties had many previous transactions of a similar character. Kidd & Pierce never made inquiry in any such cases to learn when the grain so shipped arrived, nor as to what become of it on arrival, nor as to the time consumed in transit. They did nothing until the maturity of the drafts, nor did they read the bills of lading. They had reason to suppose that cargoes sometimes arrived befor the maturity of the drafts. In the previous shipments no notice had been given them of the arrival of the cargoes. The conrse of business had been, that upon the payment of the paper by Griffin & Co. at maturity, the bills of lading had been endorsed over and delivered by the consignees, without any previous effort on their part to learn where the goods were or the length of time used in transportation. This evidence was resorted to, as establishing the course of dealing between the parties, and as tending to show negligence on the part of the consignees. This the defendant urged extinguished the claim of the plaintiff which it was insisted was but a lien.

The judge at the trial directed a verdict for the defendants. A motion for a new trial was denied. The judg-

ment entered upon the verdict, was affirmed at the General Term, whereupon the plaintiff appealed to this court.

Edward Bissell, for appellants.

George W. Parsons, for Respondent.

DWIGHT, C.

The plaintiff in this case under the bill of lading executed at Toledo, had the legal title to the property. True it held this not as absolute owner, but to secure its advance, the ultimate interest appertaining to Grffin & Co., still the title was in the plaintiff. So long as the advances were not paid there was no theory whereby Griffin & Co. could claim title. It had never been in them. At the moment their interest, whatever it was, accrued to them, itcame to them burdened with the formal ownership of the plaintiff. The bank held the title in trust for Griffin & Co., after its own claim was satisfied.

This would be the result of the transaction as between the parties, even though no bill of lading had been executed. Bank of Rochester, vs. Jones, 4 New York, 497. The bill of lading was merely an instrument to carry out the true intent of the transaction as evidenced by their dealings.

Before entering in detail into the question of the plaintiff's title, it is important to notice whether the bill of lading was drawn in such a way as to accomplish the parties intent, or whether it was in any proper sense of the term ambiguous. Instruments of this kind are familiar to the legal profession, and the construction of some of the clauses in the one under consideration has been settled ever since the case of Dows, vs. Perrin 16 New York 325(A.D 1857.) In that case, there were bills of lading of corn by two canal boats, to the care of Dows & Carey, for account of one Mack. The court said that this language vested the title in Mack. The regular method of setting forth his title as the consignee or party entitled to control the goods on their arrival would have been for the owners who shipped it to have endorsed the bill.

making the corn deliverable to him or his order. This, however, was done in substance by stating upon the face of the paper, that the shipment was made on his account. When the document thus prepared was delivered to Mack, it purported to be a transfer from Niles and Wheeler (the consignors) to him of the corn, and to be a contract on the part of the proprietor of the transportation line to carry it to New York, and deliver it there to Dows & Carey according to his directions, for the priceof freight mentioned in it, p. 329 Dows vs. Green 24. N. Y., 638.649, (A.D. 1862) reiterates this ruling under an instrument having substantially the same terms as were employed in the case at bar. The effects of the words showing that the title was in the bank, and that Kidd, Pierce & Co., and A. L. Griffin & Co., were its agents, were not changed by the fact, that there were additional words "B'k a'c to T. W. Griffin & Co." There is nothing in those words on their face to show that the title was in Griffin & Co. As far as they can be interpreted by a mere pursual of them, and considering the abreviations to mean "Bank accounts," they refer to some relation between the bank and Griffin & Co., and not to any dealings between the owners of the grain and the bank. Evidence however, was given to explain the commercial meaning at Toledo Ohio, of the words, the result of which was that they were a mere notation to show that the bank held title to secure the payment of a debt due from Griffin & Co. It was objected by the defendants that this evidence was not legitimate, on the ground that this was not an Ohio, but rather a New York contract. The advance of money was made in Ohio, the transfer of the grain took place there, and the bank as between itself and other persons with whom it dealt Carrington & Casby, was entitled to repayment there. The drafts on Griffin & Co., and the bill of lading were merely a mode of reimbursment. The contract is in substance an Ohio contract. Story on the Conflict of Laws 287. It is

there laid down that when advances are made. in such a case, the undertaking is to replace the money at the same place at which the advances are made, even though the mode of reimbursement be by drafts on a foreign country. Lanusse vs. Barker 3d Wheat 101, 146, Grant *vs.* Healey 3 Dumner 523, Boyle, vs. Yacharie 6th. Peters, 635, 643-4. In the more general case, where a contract is made in one country and to be performed in another, it is not always easy to determine, according to the authorities, whether the interpretation of words is to be governed by the law of the place where the contract is made or by that where it is to be performed. The general principle is that the law of the place where the contract is made is to govern, unless it is positively to be performed elsewhere. The fact that acts are to be done abroad under a contract does not necessarily make it a contract to be performed there in a legal sense. Thus it has been said that a policy of insurance executed in England,on a French ship, for a French owner, on a voyage from one French port to another, is to be interpreted as an English contract, Dunn vs, Lippman 5 Cl. & F. 1, 19. The true inquiry is what was the intent of the parties. It would seem that in a case like the present, where the contract was made in Ohio, by Toledo parties, the money being advanced there, and the security there, that they had in view in employing words their own usages, even though the goods were to be sent to another state and ultimately sold there if the advances were not repaid. The result is, that the bill of lading executed at Toledo was intended to vest the title in the grain in the plantiff; that A. L. Griffin & Co. were its agents to forward the cargo to New York; that Kidd & Pierce were its agents in New York to receive the goods, and that when the advances were repaid the bills of lading were to be assigned to T. W. Griffin & Co.

The authorities clearly sustain these conclusions. Bank of Rochester vs. Jones, supra; Haille vs. Smith 1. Bos. & Pul

563, Took vs. Hollingworth 5. Term 215; Allen vs. Williams 12 Pick, 297; City Bank vs Rome Rail Road Co., 44 N. Y. 136; Rawls vs. Deshler 3 Keyes 572. The subject is set forth in a clear light in the case of Haille vs. Smith supra. In that case, a cargo was consigned to bankers to secure them for advances and a bill of lading indorsed to them. It was also understood that the cargo was to be sold for the account of the consignees who received the advances. Subsequent to the consignment the bankers applied for directions respecting the disposal of the cargo and the price to be asked. The court held that this arrangement did not create the relation of principal and factor, but that the bankers held the title in trust to effectuate the intent of the parties. The consignors had a residnary interest so as to gain by a rise or lose by a fall of the market value of the goods. This fact, however, only related to the mode in which the trust was to be carried into execution. The title to the cargo was in the bankers, who had the evidence of it in the bill of lading, which was itself upheld by the valuable consideration paid for the transfer.

Bank of Rochester vs. Jones is to the same effect, though the apparent title was not so clear as in Haille vs. Smith. In that case, one Foster applied to a bank to borrow $950 for the purpose of buying 200 barrels of flour, and proposed to leave a forwarder's "receipt" for the flour, so purchased, as security for the acceptance of a draft to be drawn on the defendant, Jones. This proposition having been accepted, the "receipt" was delivered, and purported that the forwarder was to forward 200 barrels of flour to B. P. Jones, Albany. The proceeds of the draft as discounted by the bank were paid over to the seller of the flour. It was the understanding, that if Jones accepted the draft, the "receipt" was to be made over to him; Jones declined to accept the draft, but got possession of the flour. In an action of trover brought by the bank against Jones, the question was whether it had

such a property as to maintain the action. It will be observed that there was no bill of lading in the bank's name. The receipt was drawn in favor of Jones. The title of the bank did not rest upon any form, but on the substance of the transaction. After deciding that Jones had no title under all the circumstances of the case, the court held that the bank had either the special or general property in the flour. It said: "The true ground on which to sustain this transfer of property to the bank is, by regarding the transaction as a *sale to the bank in trust*, to deliver the property to Jones in case he accepted the draft, and if he refused to accept the draft then to sell the flour and retain out of the proceeds the amountof the draft, and to pay the surplus, to Foster," p. 302; The case of the City Bank vs. R. W. & A. R. Co., followed the case just cited, and holds that the delivery of a bill of lading by an owner with intent to pass the title actually passes it, whether drawn to "assigns" or not, and if drawn to "assigns" whether it be indorsed or not. In this case again the substance of the transaction is regarded rather than the form. The only material point is whether there was an intent to past the title to the goods for a consideration. The intent may be either to pass it absolutely or conditionally or in trust; whatever the intent may be the court will carry it into effect.

Following these authorities, it is necessary to hold that when the goods were shipped at Toledo, the plaintiff held the title to the flour charged with a trust in favor of T. W. Griffin & Co., to whom it was to be made over, if they accepted and paid the drafts drawn against it,

It is now necessary to examine the acts of A. L. Griffin & Co., at Buffalo. It is plain that it was the intent of the parties that the grain should be transhipped at Buffalo to New York. This is shown by the Toledo bill of lading, as well as by the known course of business. The words, "care A. L. Griffin & Co.," made those parties consignees at Buffalo,

only provisionally, and as incidental to the main object of the transit, which was to end in New York. Their authority was limited by the object sought to be accomplished. It was in writing, disclosed on the face of the bill of lading, and according to well settled principles must be strictly pursued. Their whole power was to forward the goods to the same consignees on the same terms as stated in the Toledo bill of lading. On the face of the canal bill of lading it was apparent that the grain had come to Buffalo by way of the lakes, and any one taking that bill would be put upon inquiry as to the authority of A. L. Griffin & Co.

But without pursuing this line of inquiry it is enough that the canal bill of lading did not differ in substance from the Toledo bill. It mentioned the same consignees, the same owners, the bank, and had the same memorandum as to the interest of T. W. Griffin & Co. The statement that the "freight charges and demurrage were payable to Young Bro's &c" was of no material significance. That only showed with whom the freight was to be settled on behalf of the carrier It cannot be considered that any holder of the grain could possibly be misled by an entry the object of which was so plain and unequivocal. In the aspect of the case most unfavorable for the plaintiff, there were indications on the canal bill which, under the ruling in Dows vs. Perrin, supra, and in Dows vs. Greene, were sufficient to lead to the conclusion that the plaintiff had an interest and to put any person who took the goods upon inquiry as to its rights.

Griffin & Co., accordingly had no right whatever to meddle with the grain, or to warehouse it. The entire control was vested in Kidd, Pierce & Co., for the use of the plaintiff. The warehouse-men, Shaw & Co., were bound to inquire whether a bill of lading accompained the shipment. Their custom to make no inquries but to warehouse grain for any one who had the possession could not in any respect prejudice the rights of the plaintiff. Having warehoused it,

they were bound to hold the grain for the rightful owner. City B'k vs. R.W. & A. R. R. Co., 44 N. Y. 141. Their receipt given for the grain was no protection to the Guaranty and Indemnity Company. Shaw & Co. simply trusted to a person having naked possession without any title or indicia of it. If on that bare possession they issued evidence of title they were mere waste paper, under which the Guaranty Company can make no claim. A mere possessor cannot confer ownership by falsely asserting through bills of lading or warehouse receipts that he has a title. Salters vs. Everett, 20 Wend, 267.

It is, however, claimed on the part of that company that it is protected by the provisions of the so called factors act. Before considering the terms of that act, it will be proper to notice the rules of the common law, as to the power of factors and others having possession of the goods of third persons, or having documentary evidence of title to such goods, to pledge them. This rule has been tersely stated by Baron Parke (Lord Wensleydale)in Phillips vs. Huth 6th M. & W. 596. He said: "Before the passing of the Factor's act, it was clearly settled that a factor or agent for sale had no power to pledge whether he was in possession either of goods themselves, or of the symbol of the goods, and even though the symbol might bear on the face of it, some evidence of the property being in himself, as in the case of a bill of lading, in which he was consignee or endorsee. This was in accordance with the general rule that he who deals with one *ex mandato*, can obtain from him no better title than his mandate enables him to bestow."

However logical this rule may have been, it was found in practice to bear hard on the interests of commerce. To remedy some of the inconveniences caused by it, the English Parliament enacted a number of statues, 4. Geo. 4. C. 83. Geo. 6. C. 94 (commonly known as the Factors act) 5 & 6 Vict. C. 39. The New York act, with some modifica-

tions, is a reproduction of that of 6 Geo. 4.

In so far as these statutes have not changed the law, the former rule, of course prevails, and the holder of the goods of another with or without documentary evidence of title has no greater power to pledge them than they confer. Paterson vs. Tash, 2. Strange 1178, Daubigny vs. Duval, 5 Term 604, Lamb, vs. Attenborough 1st. Best & Smith 831.

There are two sections of our "Factors act" to be considered in their relations to the present case, the first and the third. The first provides that every person *in whose name* any merchandize shall be shipped shall be deemed the true owner so far as to entitle the consignee of *such* merchandize, acting in good faith, to a lien thereon (1) for any money advanced or negotiable security given by such consignee for the use of the person in whose name the shipment is made and (2) for any money or negotiable paper received by the person in whose name such shipments shall have been made for the use of the consignee.

It is plain that this section has no application to the present case as it has been shown that the shipment cannot be deemed to be made in the name of Griffin & Co.

The third section of the act provides that every factor or other agent *entrusted* with the possession of any bill of lading, custom, house permit, or warehouse-keeper's receipt for the delivery of any "such" merchandize (refering to the first section) and every such factor or agent not having the documentary evidence of title, who shall be entrusted with the possession of *any* merchandize for the purpose of sale or as security for any advances to be be made or obtained thereon shall be deemed to be the true owner thereof so far as to give validity to any contract made by such agent with any other person for the sale or disposition ofthe whole or any part of such merchandize for any money advanced &c., by such other person on the faith thereof. Laws

of 1830, Chap. 179.

It is urged by the defendants that the fact that the forwarding house at Buffalo sent the canal bill of lading to T. W. Griffin & Co., brings the case at bar within this section.

To sustain this view, it is necessary to show that Griffin & Co., were factors or agents, that they were "entrusted" with the bill of lading for the delivery of *such* merchandize as was provided for in the first section, and that an advance was made to them on the faith of the document with which they were entrusted.

It needs no argument to show that Griffin and Co.. were not factors of the plaintiff. The statute presupposes that the relation of principal and factor already subsists when the trust or confidence is reposed in him, In other words, the relation of factor is not created by the mere possession of the instrument, though that may raise a presumption when in the alleged factor's name, otherwise the relation is to be proved aliunde, Cook vs. Beal 11 Bosw, 497. Nor can Griffin & Co., be regarded as agents of the plaintiff. No power was given in the lake bill of lading, to make them the agents of the plaintiff, and if the Buffalo house without authority, sent the canal bill of lading to them, they did not thereby become agent, since that relation could only be created by the act of the plaintiff. Lamb vs. Attenborough 1, Best & Smith 831.

It cannot be claimed that Griffin & Co., were entrusted with the possession of the merchandize. If intrusted with anything it must have been with the bill of lading. It is accordingly neccessary to give a construction to the statutory words "entrusted with the possession of a bill of lading of any such merchandize" &c. The word 'entrusted' here implies confidence reposed. If the bill had been stolen there would have been no intrusting. The consent of the owner is necessary. True, it may be obtained by fraud, Sheppard

vs. Union Bank of London 7 H. & N. 691; Dows, vs. Green 24, N. Y. 638, but it must in some form be had. There was here no trust by the owner, the lake bill of lading gave no authority to A. L. Griffin & Co., to repose any confidence in T. Griffin & Co. Again the same word "intrusted" refers to a bill of lading *in the name of* the factor or other agent. This is assumed in all the English cases. It was so expresely so defined in the first Factor's act 4. Geo. 431. The court in Phillips vs. Huth supra said' "the first section of that act shows that the word 'intrusted' was not unimportant, and was advisedly introduced for it provides that the person *in whose name goods shall be shipped* shall be deemed to be intrusted therewith, for the purposes of the act unless the contrary thereof shall appear or be shown in evidence by the person disputing the fact. p. 596. This construction is strengthend by the words "such merchandize." The language is that every factor &c. entrusted with the possession of any bill of lading &c. for the delivery of any "such merchandize" (referring to the first section) shall be deemed to be the owner thereof. On examining the first section, it is found to apply only to cases where the merchandize is shipped *in the name* of the person who assumes to control it. Cartwright vs Wilmerding infra. On the other hand, when the case of a factor &c. not having any documentary evidence of title but having possession is provided for in the statute, the word "such" is omitted, and the word "any" is substituted its place. Section third thus provides for two entirely distinct classes of cases; one, where the factor &c. has documentary evidence of *such* merchandize as is refered to in the first section, running to himself the other where he is intrusted with the possion of *any* merchandize whatever, for the purpose of sale. In the first of these cases, the evidence must be complete pointing to himself as owner, and with no notice by the bill of lading or otherwise that he is not the actual and *bona fide* owner. See

seetion second, and Cartwright vs. Wilmerding 24 N. Y. 527. Bonito vs. Mosquera, 2d, Bosw 401.

Moreover the defendant, the Guranty Gompany, did not advance the money to Griffin & Co *on the faith* of the bill of lading &c. This is one of the requirements of the factor's act. Jennings vs. Merrill 20th Wend-9. It acted on the warehouse receipt of Shaw & Co., which was itself issued without any reference to documentary title, and relying only on the manual and unauthorized possession of Griffin & Co. Even if the bill of lading had been before the defendant, it could not properly be said to act on the faith of it, as it would have had constructive notice that the goods were not entrusted to Griffin & Co., not being in their names. Bonito vs. Mosquera 2 Bosw. 401; Pegram, vs. Carson 10 id 505, Cartwright, vs. Wilmerding 24 553 N.Y, The only explanation consistent with good faith, that can be given of the possession of Griffin & Co., of the canal bill of lading, is that they were mere bailees of it to hand to Kidd, Pierce & Co., or that they received it by mistake. There was no evidence to show fraud or collusion on the part of the Buffalo house, and these are not to be presumed. Nothing could be more contrary to established and elementary principles, than to hold that a mere bailee of a bill of lading, such as a finder or depositary having no apparent title to it, could make a valid transfer of it, or create a lien upon the goods which it represents in favor of a third person who might make advances to the possessor, with or without knowledge of the actual state of facts.

The defendants take an additional ground. It is urged that the plaintiff has lost his rights under the bill of lading, through his negligence in not observing the arrival of the canal boat. It is not perceived how any remissness subsequent to the advances made by the Guaranty Company would affect the plaintiff's rights. Whatever interest the defendant acquired accrued on the 17th of October, when the

advance was made. The boat arrived on the 16th. This theory of negligence must rest on the view that the plaintiff's claim was a mere lien. It has already been shown that this was not the case, but that the plaintiff had the title. The Court below laid some stress on the fact that the plaintiff's cashier stated in his testimony, that the transaction was a pledge. His version of a transaction entered into by written instruments, is not binding on the Court. However, even if the transaction constituted a pledge, the rule which holds that a mere lienor may lose his lien by negligence &c. is not applicable. A pledge has something more than a mere lien. He has a property in the goods, and not simply a right to hold them as in the case of a lien. The negligence of the plaintiff under the circumstances is wholly immaterial. The rights of the defendant depend on the question whether Griffin & Co. were in any form held out by the owners, as entitled to control the corn. That point can only be determined by the fair construction of the bill of lading. If the Guaranty Company saw fit to act on the so called warehouse receipt, which itself had no solid foundation, it acted at its peril. It should have inquired into the title, and examined the documentary evidence accompanying the shipment of the grain. City Bank, vs. R. & W. & A. R. R. supra. It cannot shield itself from this obligation by imputing negligence to the plaintiff, who was not bound towards mere strangers to be diligent in looking after his property while in the possession of the carrier. Even if there was some evidence of negligence, it depended so much on a variety of circumstances, that it should have been left to the jury to determine whether the plaintiff had been guilty of it. Without dwelling upon this point, it is enough to say that the question of negligence does not enter into the case.

The defendant further claims that as Griffin & Co. had paid for the grain on account $1945.80, and as the Guaran-

ty Company had acquired Griffin's interest, it was absolutly necessary, to the maintenance of this action, that this amount should have been tendered by the plaintiff.

This is a misconception. If Griffin & Co. had detained the property, no such payment would have been necessary, as the possessory right of the plaintiff would have continued superior to that of Griffin & Co., until the entire debt was paid. The Guaranty Company standing in Griffin's position, and acquiring his rights can have no greater claim. The Court below were requested to instruct the jury that as far as the defendants were concerned, if a verdict was rendered in their favor, the value of the property should only be assessed at the advances made by the Guaranty Company, and interest. This instruction was refused under exception, and an instruction was given that the entire value of the propretyshould be found.

This ruling was errornoeus. In any aspect of the case, the plaintiff had not lost its lien as between it, and Griffin & Co. The case is governed by the rule Townsend vs. Bargy. Com. Appeals, Jan. Term, 1874. This is, that the value to be assessed, as against the owners or his representatives is the creditors claim with interest. The result of the discussion may now be summed up. The title to the grain in controversy was held at Toledo, by the plaintiff, in trust and after its own advances were paid, any residuary interest was to be made over to T.W. Griffin & Co. The canal bill of lading recognized the true relation of the parties, and left the title in the same way. The fact that this bill came into the hands of Griffin & Co., through the act of Young Bros., was of no importance, as the bill did not import a delivey to the former firm. Shaw & Co., could not safely repose onr the mere possession of Griffin & Co., but were bound to look into the shipping documents, and are according chargable with constructive notice of their contents. The Guaranty Company, are in the same position with & Shaw Co. The

warehouse receipt being mere waste paper, that Company can claim no rights under it. Such a "warehouse receipt" is not one intended by the Factors Act. That refers to the receipts given in foreign trade or importation (Cartwright vs. Wilmerding, 24. N.Y. 528.) Even if it were within the intent of the Act, it would not help the defendants, as it did not rest on any confidence or trust reposed by the owners in them, or in those from whom they received possession.

The plaintiff accordingly could maintain his action of replevin against these defendants, based on his property, whether general or special, in the goods.

Considerable stress was laid, on the argument, by counsel on either side of the case, on the great consequences to commerce of a decision in this cause adverse to their respective views. Finding the principles of law clearly settled, we are bound to administer them as they have come down to us from our predecessors. We, however believe that a decision cannot on the whole be adverse to commercial interests, which while it recognizes the convenience of merchants and the great value and importance of the Factor's act requires of those who advance money on commercial documents the observance of reasonable diligence and the obligation to make reasonable inquiry, and enables owners of property on the great transportation lines of inland commerce, to secure it from the frauds and depredations of mere custodians and bailees in whom no special confidence is reposed. While commercial convenience must be respected, the rights of property must not be sacrificed. It is not a case for the application of the rule that where one of two persons must suffer, that one must sustain the loss, who has reposed the confidence. No confidence has been reposed in the persons under whom the defendants claim. On the other hand, great care was taken to keep the title to the property and the indicia of ownership regularly in the plaintiff. The true interests of commerce demand that the claims under bills of lading and

other such instruments should be scrupulously protected-since commerce will not flourish where the rights of property are not respected.

The judgment of the court below should be reversed and a new trial ordered:

"All concur.,'

A copy, but not for publication.

H. E. SICKELS.

Reporter, Per. C.

SUPREME COURT

OF MASSACHUSETTS.

FRANCIS E. STOLLENWERCK,
and OTHERS,
vs.
HENRY C. THACHER, and
ANOTHER.

Tort for the conversion of one hundred and eighty-nine bales of cotton. At the trial, before *Morton*, J., the jury were directed to find a verdict for the plaintiffs, and the case was reported for the consideration of the full court; and is stated in the opinion.

Gray, C. J. This is an action of tort for the conversion of a number of bales of cotton. A verdict has been ordered for the plaintiffs, and the case reserved for the determination of the full court upon a report containing an abstract of the evidence given at the trial, and a number of letters and documents. But the facts material to the decision, assuming all the controverted ones to be according to the testimony introduced by the defendants, are not many; and a brief statement of them will tend greatly to narrow the discussion of the principles of law by which the case is governed.

The plaintiffs, being buyers of cotton in Mobile, made an arrangement with Joseph I Barker, a cotton broker in Boston, by which they agreed to pay him, upon such orders

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on them as he should obtain from his customers here, fifty cents a bale, out of their own commission of one and a half per cent., furnish him with types of their classification of cotton, and keep him advised at their own expense of the condition of the cotton market in Mobile; he agreed to procure and transmit the orders, and inform his customers of their acceptance or rejection; and the invoices were to be sent by the plaintiffs to, and the drafts for the price drawn, upon the customers, and the bills of lading attached to the drafts.

In pursuance of an order given him by Gorham, Gray & Co., Baker telegraphed to the plaintiffs to buy for them two hundred bales of cotton. The plaintiffs replied, refusing to negotiate on any other basis than that the bill of lading should be attached to the draft. They bought the cotton in Mobile, drew a bill of exchange on Gray & Co., against the cotton, took the bill of lading in their own name, indorsed it in blank, attached it to the bill of exchange, procured the latter to be discounted at a bank in Mobile, informed Baker of what they had done, and instructed him, on receiving the draft and bill of lading, to hold the bill of lading until the draft was paid. Baker by telegram and letter assented to all this. The invoice sent by the plaintiffs to Gray & Company, showed that the cotton was consigned to the plaintiffs order. The Mobile bank transmitted the draft, with the bill of lading attached, to a bank in Boston, which preented the draft, to Gray & Co., for acceptance. Upon susch presentment Gray & Company asked for the bill of lading, and were told that Baker was to receive it. Gray & Company then accepted the draft, the bank delivered the bill of lading to Baker, and he afterwards delivered it to Gray & Company, who obtained the cotton from the carriers, gave them a check for the amount of the freight from Mobile to Boston, and pledged the cotton and delivered the bill of

lading to the defendants as security for the payment of advances on the cotton. Gray testified that he accepted the draft upon Baker's assurance that he would hand him the bill of lading as soon as it came to Baker's possession, that Baker shortly afterwards delivered to him the bill of lading unconditionally, and that he transfered the cotton to the defendants believing that he owned it; and his testimony, though contradicted by Baker's, must be assumed to be true for the purpose of deciding whether a verdict was rightly ordered for the plaintiffs.

Baker and the plaintiffs were not partners as between themselves, and Gray & Company did not deal with Baker as a partner of the plaintiffs. His relation to the plaintiffs was that of a broker only. He looked to them, and not to the cotton, for the payment of his commission. The case is not within the Gen. Sts. *c* 54. * Baker was not a factor, or a general agent entrusted with the goods for the purpose of sale; but a special agent, with positive and restricted instructions to receive the bill of lading on the acceptance of the draft, hold the bill of lading and the cotton until the draft was paid, and then deliver them to Gray & Compay. He had no right of possession of the bill of lading or the cotton for any other purpose, and no title in or lien on the cotton. This is not a case of stoppage *in transitu*. Gray & Company were not named in the bill of lading as consignees of the cotton, and the plaintiffs have never been divested of their property in the cotton as against Gray & Company or any persons claiming under them.

The numerous cases cited at the bar differ in their circumstances rather than in the statement of principles. A

* Gen. Sts. *c.* 54, § 2, provide that "Every factor or other agentintrusted with the possession of merchandise, or a bill of lading consigning merchandise to him, for the purpose of sale, shall be deemed to be the true owner thereof so far as to give validity to any bona fide contract made by him with any other person for the sale of the whole or any part of such merchandise."

bill of lading, even when in terms running to order or assigns, is not negotiable, like a bill of exchange, but a symbol or representative of the goods themselves; and the rights arising out of the transfer of a bill of lading correspond not to those arising out of the endorsment of a negotiable promise for the payment of money, but to those arising out of a delivery of the property itself under similar circumstances. If the bill of lading is once assigned or endorsed generally by the original holder, upon or with a view to a sale of the property, any subsequent transfer thereof to a *bona fide* purchaser may indeed give him a good title as against the original owner. But so long as the bill of lading remains in the hands of the orginal party, or of an agent entrusted with it for a special purpose, and not authorized to sell or pledge the goods, a person who gets possession of it without the authority of the owner, although with the assent of the agent, acquires no title as against the principal, *National Bank of Green Bay* v. *Dearborn*, *ante*, p. 219, *Gurney* v. *Behrend*, 3 E. & B. 622, 632, *Pease* v. *Gloahec*, L. R. 1 P. C. 219, 248.

In the present case, Baker, being a special agent authorized to deliver the bill of lading only upon the payment of the bill of exchange drawn against the goods, and attached to the bill of lading, could not bind his principals by a delivery made without such payment. To hold otherwise would be to allow a person, entrusted with goods merely for the purpose of collecting the price and then delivering them, o sell them on credit. The authority of Baker, being special and limited, could not be enlarged by his own declarations. *Mussey* v. *Beecher*, 3 Cush. 511.

It follows that Gray & Company, not having paid the draft, nor acquired possession of the bill of lading with the plaintiff's consent, had no property in the goods, and could convey none to the defendants, so as to defeat the plaintiff's title. The plaintiffs are therefore entitled to re-

cover.

This is not an action in the nature of assumpsit for the proceeds of a sale of the property, in which the plaintiffs might be deemed to have waived any tort, and be obliged to submit to a deduction of the expenses of the sale by which such proceeds had been obtained. It is an action in the nature of trover for the conversion of the goods, in which the plaintiffs are entitled to recover their market value at the time of the conversion by the defendants, and are not obliged to allow a commission to Gray & Company for doing an act which is not shown to have been for the interest or according to the intent of the plaintiffs, *Bartlett* v. *Brumball*, 3 Gray, 257.

But the amount paid by Gray & Company to discharge the lien which the carriers had against the plaintiffs, for the freight on the cotton, enured to the benefit of the plaintiffs and should be deducted from the market value of the goods, *Adams* v. *OConnor*, 100 Mass. 515, *Whitney vs. Beckford*, 105 Mass. 267. That amount must therefore, unless the parties agree upon it, be ascertained by an assessor, pursuant to the terms of the report, the verdict amended accordingly, and

Judgement rendered thereon for the plaintiffs.

Commonwealth of Massachusetts.

BOSTON, Nov. 10th, 1874.

I CERTIFY the annexed to be a true copy of the opinion of the Supreme Judicial Court in the case of Francis E. Stollenwerck, *et als.*, *vs.* Henry C. Thacher, *et al.*, argued at Boston, on the 19th day of March, 1873.

JOHN LATHROP,
Reporter of Decisions.

N.Y. Court of Appeals

THE MANUFACTURERS' AND TRADERS' BANK OF BUFFALO,

Appellants,

against

THE FARMERS' AND MECHANICS' NATIONAL BANK OF BUFFALO, *et al.*,

Respondents.

OPINION.

Milwaukee News Company, Printers.

COURT OF APPEALS.

STATE OF NEW YORK

THE MANUFACTURERS' AND TRADERS' BANK OF BUFFALO,

Appellants,

against

THE FARMERS' AND MECHANICS' NATIONAL BANK OF BUFFALO, *et al.*,

Respondents.

On the 8th of November, 1871, George I. Jones & Co. shipped from Milwaukee, per propeller Mohawk, 15,000 bushels of wheat, consigned to the care of S. K. Worthington, Buffalo, N. Y. A draft was drawn against the bill of lading for $18,956.13 on Mr. Worthington, payable at sight, and forwarded to the Manufacturers' and Traders' Bank for collection. The bank made an advance of $19,000 to Worthington on pledge of the bill of lading. He made a verbal sale of the wheat to O. L. Nims, to arrive. The propeller arrived on or about the 17th of November, when Mr. Worthington gave Mr. Nims an order in the following words:

BUFFALO, Nov, 17, 1871.

Propeller Mohawk or Niagara Elevator:

Deliver to Erie Railway fifteen thousand bushels of Milwaukee wheat, more or less, subject to——order.

S. K. WORTHINGTON.

This order was delivered by Mr. Nims to the Erie Railway Company, and he received from them a receipt consigning the wheat as follows: "Account O. L. Nims, agent; care J. M. Fiske & Co., New York, subject to order Farmers' and Mechanics' National Bank of Buffalo."

This railway receipt Mr. Nims pledged to the Farmers' and Mechanics' National Bank as security for the acceptance and payment of a draft drawn by him on J. M. Fiske & Co., at thirty days, for 18,750. The acceptance of the draft was refused, and the Farmers' and Mechanics' Bank sold the property to protect its advances. The Manufacturers' and Traders' Bank brought suit against the Farmers' and Mechanics' National Bank to recover the amount originally loaned by it on the lake bill of lading covering the wheat in question. After protracted litigation the case was finally decided in the Court of Appeals. The decision, as rendered by Justice Miller, and concurred in by the full bench is as follows:

COURT OF APPEALS.

The Manufacturers' and Traders' Bank of Buffalo,
Appellants,
against
The Farmers' and Mechanics' National Bank of Buffalo, et al.,
Respondents.

SHERMAN S. ROGERS, Counsel for Appellants.

WM. H. GREENE, Counsel for Respondents.

MILLER J.:

Upon the trial of this case at the circuit, the defendants' counsel excepted to that part of the charge of the judge to the jury to the effect that the plaintiff was entitled to recover

if the jury believed that the arrangement for the delivery of the wheat to the railway company, was as is stated to have been by Worthington. Assuming that the exception covered a portion of the charges made, the principal question in the case arises, I think, upon this exception. A proper consideration of this question involves an inquiry as to the effect of the order made by Worthington, by which it is claimed he parted with the plaintiff's claim to the grain, and which reads as follows:

BUFFALO, Nov. 17, 1871.—Prop. Mohawk, *or Niagara Elevator:* Deliver to Erie Railroad fifteen thousand bushels Milwaukee wheat, more or less, subject to —— order.
15,000 bushels. S. K. WORTHINGTON.

The evidence showed that the wheat in question was purchased in Milwaukee for Worthington, and paid for by a draft on Worthington, payable to the order of D. Ferguson, cashier. This draft, together with the bill of lading, in which it was stated that it was on account of D. Ferguson, cashier, and to the care of Worthington, and a policy of insurance upon the same, was sent to the plaintiff for the purpose of having the draft collected. To meet this draft, Worthington made his note, payable to the order of the plaintiff's president, at their bank, in thirty days, which was discounted at the bank, which at the same time received from Worthington an indorsement of the bill of lading and the insurance policy, as security for the loan. The delivery of the bill of lading to the plaintiff was a good symbolical delivery of the grain, and the plaintiff thereby acquired a lien upon it, or title to it, and was fully authorized to hold it until the loan was paid.

Bank of Rochester vs. Jones, 4 Comst., 497,507.
City Bank of Rome, vs. Rome, Watertown & Ogdensburgh R. R. Co., 44 N. Y., 136.

The Judge ruled at the trial that the plaintiff was a mortgagee of the grain, but whether plaintiff held it as mortgagee, pledgee, or by any other title, is not material so long as the title or the right to the possession was vested in the plaintiff.

To all intents and purposes the plaintiff's property in the wheat was clearly established, and beyond any question.

The plaintiff being thus entitled to the wheat, it remains to be considered whether it did any act by its officers, or by means of its authorized agent, which has deprived it of the title which it had acquired. The bank itself did no act, and if any was committed which impaired the plaintiff's ownership of the wheat, it was done by means of Worthington, who, by an arrangement or understanding when the note was discounted, was to take charge of the cargo upon its arrival and place it in store subject to the order of the plaintiff as security for the draft which had been discounted. Worthington did place it in store accordingly, and took a receipt for it, subject to his own order, which was contrary to the arrangement with and without the knowledge of the plaintiff. He had an undoubted right to exercise a control over the disposition of the wheat for the benefit of the plaintiff, and had he sold it absolutely to any party, without notice of rights to the bank, the plaintiff would have no ground to complain, as he would be acting entirely within the scope of his authority as the plaintiff's agent in so doing. I think he did not make any such disposition of the grain as deprived the plaintiff of its title thereto. The oral agreement which he had made with Nims was without any direct authority from the plaintiff, but assuming that such authority existed in Worthington as plaintiff's agent, the contract with Nims not being in writing, nor any money paid or property delivered, it was void within the statute of frauds. It vested no title whatever in Nims, individually or otherwise. Neither party was lawfully bound by it, and each of them would be justified in refusing to perform it.

Nor in my opinion did Nims acquire any right to the grain by the mere delivery of the order by Worthington to him. *The order upon its face conferred no right upon Nims to receive the grain, and no such construction can legitimately be placed upon it.*

The true meaning and effect of the order was that the wheat should be delivered to the Erie Railway Company for Worthington himself. This did not authorize Nims or any one else to receive a bill of lading from the company, or the company to transport the same without further directions. The fact that Nims had possession of the order of itself conferred no right to take out a bill of lading in his own name. If it had been delivered to a clerk or an entire stranger, and handed to the company, neither of them would be justified in giving him a bill of lading and transporting the wheat for his benefit. Or, if, after the receipt had been delivered, Nims had refused to pay before he had received a bill of lading, he would not be liable because he delivered the order without some extrinsic evidence to establish a sale. There was a conflict in the evidence as to whether the blank between the words "to" and "order" had been filled up with a blank line from a pen; but assuming, as is claimed, that the words "subject to order" were erased, it made no difference, and the legal effect was the same. In this form it was a notice to the railway company, to whose freight agent it was delivered, to hold the wheat until Worthington, who had signed the order, gave directions in regard to it. Certainly it would not bear the interpretation that it was subject to Nims' order, for his name was not mentioned. It did not direct that the grain should be shipped in Nims' name, or in any other name except Worthington's, or in any way convey the idea that Nims was the owner of the grain, or that any other person but Worthington, who had signed the order, had a right to control it.

We have been referred to a class of cases which it is claimed hold that the order in question was sufficient to authorize a delivery of the wheat. I think they are not analogous, and in no way decisive upon the question of delivery. In Rawles vs. Deshler, 3 Keyes, 572, the order was to deliver to the purchaser of the grain or order, and it was delivered on the production of the order, and shipped by him in his name. The words "subject to order until paid for" may well be held to be evi-

dence of an agreement between Deshler, who made the draft, and Griffin, who purchased the grain, that Griffin should hold it subject to Deshler's order, until payment should be made. The order simply transferred the grain subject to the lien of Deshler, and the principle decided has no application.

In Dows vs. Greene, 24 N. Y., 638, the seller of the grain made and delivered to Bloss, the agent of the buyer, Mack, a bill of lading, for "account J. F. Mack, care of Dows & Cary." The consignees, Dows & Cary, advanced money in good faith on the bill, and it was held that they had a lien under the factor's act, as well as upon equitable grounds. This is not applicable to the case at bar, and no case is cited which holds the doctrine that the delivery of an order of this kind confers authority upon a person not named in it to receive a bill of lading in his own name to the detriment of the real owner.

The defendant's counsel claims that the railway company held the wheat for Nims, as his bailee, as soon as it was placed in the cars, and not for Worthington, between whom and the Erie Railway Company there was no privity of contract.

In this I think he is mistaken, as the order itself *on its face showed that Worthington was in possession and had the control of the wheat.* The authorities cited to show the legal effect upon the possession of a delivery order have no application to a case where *the order itself* shows who is entitled to control the property, as was the case here.

Conceding the rule, as was claimed by the learned counsel for the defendant, that the delivery to the carrier is constructive delivery to the vendee, (see Wilkes vs. Fountaine, 5 Johns, 335, Ludlow vs. Browne, 1 Johns, 16; Ellis vs. Hunt, 3 Term, 469) it does not affect this case unless Nims was the actual vendee, which was a disputed question of fact upon the trial, and submitted to the consideration of the jury by the judge.

It is plainly manifest, I think, that there was no delivery of the grain to Nims by means of the order referred to, within the statute of frauds, which divested the plaintiff of its title. Nor

does the fact proven on the trial that Nims had previously made arrangements with the Erie Railway Company for the transportation of the grain, help the plaintiff's case. The question of delivery as between Worthington and Nims, depends upon the arrangement between them, and in no respect upon the knowledge which any third party had of the intention of one of them; for if such was the case it might well be that an innocent party would be deprived of his rights by the secret arrangements to dispose of property fraudulently obtained.

The question whether Worthington had made an arrangement to part with the possession of the property, or intended to retain the title and control of it until Nims paid for it, depended upon facts proved upon the trial in connection with the order. Worthington testified that he did not make any such arrangement, and did not mean to part with the title or possession, and there is a conflict in the testimony as to some of the leading facts bearing upon this question, which it was eminently proper to submit to the consideration of the jury, as was done in the charge.

If the construction placed upon the order is correct, then it cannot be claimed that Worthington by his own act and fault had clothed Nims with the possession and apparent title to the wheat, so that he was enabled to obtain the wheat, place it into the hands of the carrier and secure a bill of lading, by means of which the money was obtained of the Farmers' and Mechanics' National Bank. Nor do I think there was any neglect on the part of Worthington which interfered with the title of the plaintiff to the grain and the right to maintain this action. It follows from the views expressed that there was no error in the portion of the charge, and that the exception is not well taken.

At the close of the plaintiff's testimony the defendant's counsel moved for a non-suit upon two grounds:

1st. That the plaintiff had no property in the wheat.

2d. That the demand was not accompanied with any evidence of the plaintiff's right of possession.

As to the first ground, we have already seen that the wheat was delivered to the plaintiff by the delivery of the bill of lading, and it thereby acquired a claim to the wheat which entitled it to maintain an action for its conversion. The possession of the wheat was in the plaintiff when it received the bill of lading, and Worthington merely acted as the plaintiff's agent in making a sale of it. The receipt taken for the wheat by Worthington in his own name was without authority, and did not divest the plaintiff of the title which had been lawfully acquired. The demand of the wheat and refusal of the defendant to deliver the same was sufficient to show a conversion.

It was stipulated upon the trial that there had been such a demand and refusal, and that the defendants claimed the right to hold the same. This embraced everything necessary to establish a lawful demand and refusal, and the plaintiff was not bound at the time to show evidence of his claim. If he was so bound it was waived by the stipulation read upon the trial.

The factor's act (Sess. Laws of 1830, chap. 179) so-called, has, I think, no application to a case like the one at bar. I concur with the opinion of the General Term that this act only applies in favor of the consignee named in the bill of lading. The Farmers' and Mechanics' Bank was not a factor or consignee of Nims, and as Fiske & Co., the consignees, did not accept the draft drawn upon them to pay for the wheat, had no claim by means of the consignees.

In the case of Dows vs. Greene, 32 Barb., 490, on appeal, 24 N. Y., 638, which is relied upon, the plaintiffs were the consignees named in the bill of lading.

But there are other reasons, it appears to me, why the factor's act should have no application in this case. The grain was not, according to the verdict of the jury, shipped in the name of Nims with the consent of Worthington or of the plaintiff. Nims was not the factor or agent of either of them; had no authority to receive the bill of lading, and only obtained it by an act which was tortuous and unlawful. Nor was the Erie

Railway Company entrusted with the possession of the wheat for the purpose of sale or security for advances within the third section of the act in question. In no respect of the case can the defendant be brought within the provisions of the act in question.

The point is not, I think, well taken, that the plaintiff cannot recover more than the amount of its advances. As the defendants were wrong-doers the plaintiffs were entitled to recover for *the full value of the wheat*, and if a recovery was had liable to account to the owner, whoever it might be, for whatever remained over and above the plaintiff's advances.

It is also insisted that the damages cannot exceed the value of the wheat at the time of the conversion with the interest upon the same, and that the judge erred in refusing to charge as requested to the above effect.

At the time of the trial it was supposed that the rule stated prevailed, but recent decisions of this court have corrected that impression, and explained and qualified the cases which seemed to justify the ruling at the circuit. The rule is, that in the absence of special circumstances *the value at the time of conversion, with interest*, furnishes the rule of compensation. (Baker vs. Drake, 53 N. Y., 211; Ormsby vs. Vermont Copper Mining Co., 56 N. Y., 623.) The request to charge, therefore, was right, and the judge should have charged accordingly. This error may be corrected by directing that the judgment be modified in this respect, and does not necessarily lead to a reversal of the judgment entered on the verdict and to a new trial.

There is no ground for claiming that nothing can be recovered beyond the proceeds of the sale, and no error was committed by refusing to charge accordingly.

The discussion had embraces all the questions raised upon the trial by the request to charge, and otherwise, which it is material to consider, and as no error is apparent except in the rule of damages laid down, the order of the General Term

must be reversed and judgment ordered on the verdict, if plaintiff stipulates to deduct from the verdict $1,574.44, the difference between the value of the wheat allowed upon the trial and the value of the wheat at the time of the conversion, and the interest thereon from that time to the time of the trial, and neither party in that event to recover costs in this court as against the other. If the plaintiff does not stipulate within thirty days, then the order of the General Term must be affirmed and judgment absolute ordered for the defendants with costs.